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No.

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1980

SHUTAO H. LIN, as Administrator of the Goods, Chattels and Credits which were of SHU REN LIN, M.D., Deceased; JOSEPH P. MALACYNSKI, as Administrator of the Estate of MICHELLE MALACYNSKI, and JOSEPH P. MALACYNSKI, individually; DONALD R. LYON and SOPHIE H. LYON; and JANE S. SHATKIN, as Executrix of the Estate of LLOYD J. SHATKIN, Deceased,

Petitioners,

vs.

AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the law permits recovery of punitive damages in death cases against American Airlines and/or McDonnell Douglas?

2. Whether petitioners are denied equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution by virtue of the fact that the court below has held in essence that they may not seek punitive damages although if the case had been brought in another jurisdiction they would have been entitled to such damages?

3. From a choice of law standpoint, when a defendant corporation has moved its corporate headquarters after an accident, which state has the predominant interest in the awarding or denial of punitive damages, the state of the former or present principal place of business of the defendant corporation?

4. Since the pleadings below were inconsistent, with some plaintiffs pleading that Texas was American's principal place of business and others pleading that it was New York, was it proper for the court below to assume it was New York?

5. Assuming that New York law governs, does the denial by such law of punitive damages only where the victim dies deny the petitioners equal protection of the law under the Fourteenth Amendment?

PARTIES

The plaintiffs in the district court and the United States Court of Appeals were as follows:

The actions below are currently known as "In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979" and bear Multi-District Litigation Master File Number MDL 391. The names of all plaintiffs in MDL 391 are set forth *infra* (*see Note* following petition).

The defendants were as follows:

American Airlines, Inc. and McDonnell Douglas Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

A copy of the opinion of the United States District Court for the Northern District of Illinois, Eastern District, is reproduced in the appendix hereto.

The opinion of the United States Court of Appeals of the Seventh Circuit dated January 5, 1981 is likewise reproduced in the appendix.

The orders sought to be reviewed were dated May 23, 1980 and May 27, 1980 respectively. These orders, made by the United States District Court for the Northern District of Illinois, Eastern Division, ruled in essence that the plaintiffs (petitioners herein) can pursue punitive damages against McDonnell Douglas Corporation (hereinafter referred to as "MDC"), but not against American Airlines, Inc. (hereinafter referred to as "American"). (*See* order of May 23, 1980 as amended by order of May 27, 1980, both of which are set forth in the appendix hereto.)

An opinion was made and rendered by the United States District Court for the Northern District of Illinois, Eastern Division, dated May 29, 1980. The United States Court of Appeals for the Seventh Circuit in essence reversed so much of the district court's order as provided for a right to pursue punitive damages as against MDC.

The orders of the United States Court of Appeals for the Seventh Circuit are dated January 5, 1981 and March 3, 1981, and are set forth in the appendix hereto.

JURISDICTION

Jurisdiction to review this order is predicated upon 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions are the Fifth and Fourteenth Amendments to the United States Constitution. The statutory provisions are: 28 U.S.C. §1292(b); 28 U.S.C. §1332; Missouri Statutes Annotated 509.200, 510.270; Missouri Revised Statutes 537.090; 22 Oklahoma Statutes Annotated, §134; 12 Oklahoma Statutes Annotated, §1053; Missouri Rules of Civil Procedure, Rules 55.19, 70.01, 70.02, 71.06.

STATEMENT OF THE CASE

These actions arise out of the crash of a DC-10 jet airliner designed and built by respondent MDC and owned and operated by respondent American. The plane was scheduled to fly to Los Angeles as American Airlines flight 191, but crashed in Illinois shortly after take-off from O'Hare International Airport on May 25, 1979. Two hundred seventy three persons were killed in this accident, the greatest number of persons to perish in an air disaster within the United States.

The actions were started in California, Illinois, New York, Puerto Rico, Hawaii and Michigan.

The accident and deaths occurred in Illinois.

There are numerous cases arising out of the accident, which are now pending before the Hon. Edwin A. Robson and Hubert L. Will, both of the United States District Court for the Northern District of Illinois, Eastern Division.

Many of these actions were filed in or removed to other federal district courts, but have been transferred to Illinois for pre-trial purposes by order of the Judicial Panel on Multi

District Litigation. With exceptions not relevant to the merits of this petition, plaintiffs' claims against MDC arise under the wrongful death statutes of various states and are pursued on theories of negligence and strict tort liability. Many of the complaints allege wrongful death actions against MDC. They contain prayers for punitive damages, in addition to compensatory damages.

MDC contends that the plaintiffs' complaints failed to state legally sufficient claims for this relief, insofar as they purport to seek punitive damages for wrongful death.

MDC's principal place of business is Missouri, but it is a Maryland corporation.

American's principal place of business is now Texas. There is a dispute in the pleadings as to American's principal place of business on the day of the accident. Most of the plaintiffs were aware of this, and advanced claims for punitive damages alleging that American's principal place of business on the accident date was Texas. However, some of the plaintiffs allege that it was New York.

American maintains that its corporate headquarters moved from New York to Dallas, Texas in August of 1979, but the decision to move was made in November of 1978. The move was completed by August of 1979. American was incorporated in Delaware.

Thus, we point out that the district court's statement that the relevant facts are primarily "undisputed" and that at the time of the crash American "had its principal place of business in New York" is *not* correct with respect to American's place of business.

Plaintiffs are the decedents' estates and personal representatives, and were residents of numerous states and countries including California, Illinois, New York, Massachusetts, Vermont, Hawaii, Puerto Rico, Holland and Japan.

The plaintiffs contend that MDC's conduct in the design and manufacture of the DC-10 was egregious. This alleged misconduct occurred in California.

The plaintiffs maintain that American's conduct regarding the maintenance of the DC-10 was egregious. They contend that this misconduct occurred in Oklahoma, the location of American's maintenance base.

Both respondents moved in the district court to strike the claims for punitive damages on the ground that such claims failed to state legally sufficient claims for relief. The parties disputed many issues: whether certain states allowed punitive damages, the choice-of-law theories to be used regarding certain states, and the results of the application of the choice-of-law theories which were used.

Using the choice-of-law rules of each state where these actions had originally been filed, the district court arrived at the following results:

Under the Illinois "most significant relationship" test, the district court found that the law of the state of the principal place of business should prevail with regard to the issue of punitive damages. Finding that New York was American's principal place of business at the time of the crash and *does not* allow punitive damages, and that Missouri, MDC's principal place of business, *does* allow the equivalent of punitive damages, the court allowed the motions to strike punitive damage claims against American but not against MDC.

Under the California "comparative impairment" test, the district court held that the policies of the state of the principal place of business would be impaired more than the policies of the state of misconduct if those policies were not applied. Thus, the court allowed the motion to strike punitive damage claims with regard to American but not with regard to MDC. The district court reached the same result with regard to the actions filed in New York, Michigan, Puerto Rico, and Hawaii.

The court of appeals found that the motions to strike claims for punitive damages should be granted with regard to both MDC and American (4a).

SUMMARY OF ARGUMENT

The district court's choice of law analysis was correct, with one exception. Where a corporation changes its principal place of business after an accident, the state with the greatest interest in controlling its conduct and awarding or denying punitive damages against it is the state of its *current* principal place of business.

The district court assumed that American's principal place of business was New York on the accident date and, based upon this assumption, then applied the law of New York, which does not allow punitive damages in death cases. Even if this assumption was undisputed, the court should have applied the law of Texas, because even American concedes that Texas has been its principal place of business from August 1979 to the present. This was the court's first error.

The court's second error was in assuming that New York was American's principal place of business on the accident date. The pleadings were in conflict on this issue.

Thirdly, the court below erred in holding that New York law, which permits the recovery of punitive damages when the victim of tort is injured but denies them when he dies, does not violate the equal protection clause of the Federal Constitution.

INTRODUCTORY

This case presents complex conflicts-of-law questions regarding the allowance of punitive damages in wrongful death actions arising out of an air crash disaster. The law of the place of the disaster, the law of the place of manufacture of the airplane, and the law of one place of business of the airline do not allow punitive damages. However, the law of the primary place of business of the manufacturer of the airplane and the law of the place of maintenance of the aircraft do allow punitive damages. The United State Court of Appeals for the Seventh Circuit, in essence, held that under each of the applicable state's choice-of-law rules, punitive damages could not be allowed against the manufacturer or the airline.

There are now one hundred eighteen wrongful death actions arising out of the crash which were originally filed in many jurisdictions, including, Illinois, California, New York, Michigan, Hawaii and Puerto Rico. As already indicated, the cases were transferred to the Northern District of Illinois by order of the Judicial Panel on Multi-District Litigation.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals erred in determining that no punitive damages could be recovered, and applied a wrong determination of the governing law.

It is ironic, but true, that if a person allegedly shoots and kills another individual, the deceased's estate cannot sue for punitive damages in many states, but only can seek compensatory damages.

In the case at bar a "Pickwickian" approach to the governing law was applied by the United States Court of Appeals, because in essence it ruled that none of the petitioners herein or the plaintiffs in the actions can seek or recover punitive damages from either of the respondents.

The main contention of MDC was that the court should apply the law of Illinois, the place of injury, to all of the actions and that since Illinois does not allow punitive damages, no plaintiff should recover such damages. American basically argued below that the law of Illinois should be applied to actions originally filed in Illinois and that New York law should apply to actions originally filed in New York and California. Since neither Illinois nor New York permits punitive damages in a wrongful death action, American contended that no punitive damages should be allowed.

The plaintiffs take various positions. Some contend that the conflicts of law rules of all the forum states require us to apply the law of respondents' principal place of business or the law of the state where the alleged wrongful conduct occurred. Other plaintiffs, notably those from Michigan and Hawaii, assert that

the conflict of law rules of those forums require the court to apply the law of plaintiff's domicile. All plaintiffs contend that under the applicable state law, punitive damages are recoverable in a wrongful death action. Additionally, plaintiffs contend that to deny punitive damages in wrongful death actions, while permitting them in personal injury actions, violates the equal protection clauses of the United States Constitution, and the various State Constitutions.

Since the jurisdiction of this Court is predicated on diversity of citizenship, we must apply the choice of law rules of the state where the actions were originally filed. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964). *See* Broder, Aaron J., "The Death Penalty and Punitive Damages," *New York Law Journal*, Feb. 8, 1980.

With respect to actions filed in Illinois, Illinois courts use the "most significant relationship" test of the *Restatement of Conflict of Laws (Second Edition)* to determine the applicable law in a tort claim. *Ingersoll v. Klein*, 46 Ill. 2d 42 (1970). Under this test, four "contacts" generally are considered most important in determining which law applied: (1) the place of the injury; (2) the place where the conduct causing injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, of the parties is centered. *Ingersoll, supra* at 47-48. Illinois courts consider the purpose of the tort rule involved when determining the relative importance of the various contacts to the issue under consideration. The important factor to be considered is the place where the conduct causing the injury occurred, especially when that is a state other than that in which the injury occurred.

The purpose of punitive damages is to punish and deter wrongdoing. *Sibley v. KLM Royal Dutch Airlines*, 454 F. Supp.

425 (S.D.N.Y. 1978); *Jackson v. Koninklijke Luchtyaart Maatschappij N.V.*, 459 F. Supp. 953 (S.D.N.Y. 1978). The state in which the wrongdoing actually occurred has a greater interest than the state where the effect of the wrongdoing fortuitously manifests itself. *See Restatement*, §146, comment e.

The principal place of business of the defendant is also deemed important in determining the issue of which state's law governs the availability of punitive damages.

A state's purpose in granting punitive damages is to insure residents' compliance with standards of conduct; a state's purpose in denying punitive damages is to limit the liability of its domiciliaries in tort actions. *Forty Eight Insulations v. Johns-Manville Products*, 472 F. Supp. 385 (N.D. Ill. 1979); *Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.I.*, 422 F. Supp. 405 (N.D. Ill. 1976). Both purposes would be served by applying the law of the state of the defendant's domicile.

In *Sibley, supra*, and *Jackson, supra*, the court held that the availability of punitive damages in cases arising from the collision at Tenerife in the Canary Islands of a Pan American 747 and KLM 747 was governed either by the law of the place of conduct and injury (Spain), or by the law of the principal place of business of KLM (Netherlands), neither of which allowed punitive damages. The court recognized that punitive damages are primarily the concern of the jurisdiction where the conduct occurred or the defendant's business was located. Denial of punitive damages reflects that jurisdiction's concern with protecting the financial interests of those doing business there and the state of residence's concern with avoiding excessive financial burdens on resident persons and corporations. *See Jackson, supra* at 956.

Neither factor requires the determination of where the relationship, if any, of where the parties is centered. We submit, as the district court did, that the places where the conduct causing the injury occurred and the states where the respondents' principal place of business are located are crucial.

If New York was the principal place of business of American at the time of the crash that would be one factor militating against punitive damages so far as American is concerned. We maintain, however, a perusal of the record reveals that the conclusive decision of American to move to Texas was consummated in 1978 and the move itself began prior to the crash and was completed by August of 1979.

With respect to actions filed in California, we note that unlike Illinois, California does not use the "most significant relationship" test to determine the applicable law in tort cases.

California courts first determine whether a true conflict exists by analyzing the interests of the states whose law might apply to the issue. *Reich v. Purcell,* 63 Cal. Rptr. 31, 432 P. 2d 727, 730 (Sup. 1967); *Hurtado v. Superior Court,* 114 Cal. Rptr. 106, 522 P. 2d 666, 679-70 (Sup. 1974). California courts recognize that there are three separate interests in wrongful death actions: First, the plaintiff's domicile may have an interest in the compensation of survivors. Second, the state of injury may be concerned with deterring wrongful conduct and protecting persons within its borders. Third, the defendant's domicile may have an interest in limiting residents' liability for damages, thereby protecting residents from excessive financial burdens. *Hurtado, supra* at 672-3.

Where the laws of the interested states conflict as to a particular issue, the court is to determine the proper law by using the "comparative impairment" approach. *Bernhard v.*

Harrah's Club, 546 P. 2d 719 (1976). Under this test, the court determines which state's policy, as reflected by its law, would be more severely affected if it were not applied. *Bernhard, supra* at 724.

As to respondent MDC, the two interested jurisdictions are (1) the place where the conduct occurred, California; and (2) the principal place of business of the respondent, Missouri.

The interests of California in this action are limited. California courts have traditionally held punitive damages not recoverable in wrongful death action. *Tarasoff v. Regents of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P. 2d 334 (1976); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1976). Disallowance of punitive damages in wrongful death actions expresses a state policy to avoid excessive financial burdens on state residents. While MDC has substantial operations in California, as well as in Missouri, it is not a California resident.

The district court correctly held that California's interest is less than that of Missouri.

American had its maintenance facilities in the State of Oklahoma, which allows punitive damages in wrongul death actions. Oklahoma should have been deemed American's effective place of business for conflict-of-laws purposes.

A perusal of the opinion of the district judges will adequately outline the applicable law with respect to the several other states herein involved.

New York courts apply the "governmental interest" approach in determining the applicable law in tort cases. *Babcock v. Johnson*, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743 (1964); *Long v. Pan Am World Airways, Inc.*, 16 N.Y. 2d 337, 266

N.Y.S. 2d 513 (1965). This test requires the court to determine which state has the greatest concern with the specific issue raised because of its relationship or contact with the parties or the occurrence. *Babcock, supra* at 481. Where there is nothing fortuitous in the fact that the injury occurred in a given state, New York courts will give great weight to the state where the injury occurred. *See Belisario v. Manhattan Motor Rental, Inc.*, 370 N.Y.S. 2d 574, 48 A.D. 2d 477 (1st Dept. 1975); *Walkes v. Walkes*, 465 F. Supp. 638 (S.D.N.Y. 1979).

However, as New York courts have recognized, air crash disasters often present situations where the place of injury is largely fortuitous. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133 (1961); *Gore v. Northeast Airlines*, 373 F. 2d 717 (2d Cir. 1967). That the injury in this case occurred in Illinois can certainly be considered "fortuitous." Under these circumstances, and considering the purpose of punitive damages, a New York court would hold that the law of the principal place of business determines the availability of punitive damages.

The highlights of the district court's opinion can be capsulated as follows:

In sum, the district court's approach was unimpeachable in looking to a defendant's principal place of business to determine the applicability of punitive damages. The court erred, however, when it looked to American's principal place of business at the time of the accident rather than its current principal place of business.

The court of appeals below (35a), correctly noted that there are inconsistencies in the pleadings with regard to American's principal place of business. However, that court's determination that despite these inconsistencies and lack of precision it could not overturn the district court's finding as to American's

principal place of business is untenable. We believe this Court has a right to review the record and to make an independent determination based upon the patently obvious aspects involved.

II.

The court below erred in holding that a defendant corporation's principal place of business at the time of the accident had a predominant interest in the issue of punitive damages, rather than its present principal place of business.

Having properly concluded under the choice of law rules of Illinois, California, New York and Michigan that a corporation's principal place of business has the predominant interest in the issue of punitive damages, the court below erred in applying the law of New York, where American's corporate headquarters had been located until its move to Texas.

Petitioners believe the court was wrong in assuming that American's principal place of business was New York on May 25, 1979, the day of the accident, since that issue had not been resolved in the record below.

However, even if this assumption by the court below was correct, the court committed a more basic error in applying the law of New York, rather than Texas. Texas is American's principal place of business now, and it has been, since, at the latest, August 1979.

Under either the significant relationship test, the governmental interest test, or the comparative impairment test, the state with the greatest concern in controlling the conduct of a defendant corporation, or in its financial protection, is its *current* principal place of business.

The principal place of business on the date of the accident has an academic interest only.

In *Miller v. Miller*, 22 N.Y. 2d 12, 290 N.Y.S. 2d 734, 237 N.E. 2d 877 (1968), a similar situation was presented. The New York Court of Appeals therein refused to apply Maine law to a claim arising out of a Maine auto accident involving a defendant-driver who was a Maine resident at the time of the accident but moved to New York thereafter. The court held that New York had the predominant interest in the protection and regulation of the rights of the parties and that Maine, the defendant's residence at the time of the accident, had no interest in applying its law. The court noted:

> "Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they were in Maine, should they move to another jurisdiction, is highly speculative . . ." 290 N.Y.S. 2d at 741.

In the instant case, American's former residence similarly retains no interest in protecting its former resident. American's present residence, Texas, has the predominant interest in applying its law on punitive damages.

The reasoning of the court below in rejecting *Miller v. Miller* is fallacious.

The court first said, at p. 83a:

> "In a similar case, *Miller v. Miller*, 22 N.Y.2d 12, 290 N.Y.S.2d 734 (1968), the New York court found that defendant who moved from Maine to New York shortly after an automobile accident in Maine involving a New

> York resident, should be considered a New York resident for the purpose of determining the applicable law. In that action, however, the defendant had previously resided in New York for a substantial period of time prior to a short residence in Maine . . . ."

The fact that the defendant in *Miller* had previously resided in New York for a substantial period of time prior to a short residence in Maine provides no distinction at all from the instant case. American has done substantial business in Texas for many years. In fact its operations base has been in Dallas even though its corporate headquarters were in New York.

The court below next said that in *Miller*, "application of the Maine law would have limited the compensatory damages recoverable by the New York resident." (83a).

But application of New York law in the instant case would exclude the punitive damages recoverable by all plaintiffs, whether they be resident of Texas, Illinois, California, New York or Michigan, so this is no distinction.

Thus the only distinctions asserted by the district court between *Miller v. Miller* and the instant case do not stand up.

The district court based its decision on "policy considerations." The court said, at p. 83a:

> "We conclude that policy considerations support finding New York, American's principal place of business at the time of the crash, determinative. A corporate move during lengthy litigation is not uncommon, but the move should not affect the substantive law to be applied in

> that litigation. Although in this action, American moved to a jurisdiction where the law arguably would increase its potential liability, the opposite situation might also occur. It would be clearly inequitable to allow a defendant to diminish the rights of the plaintiff through moving corporate headquarters, however legitimately, at some point after the injury occurred. We will, therefore, consider New York the relevant principal place of business for defendant American."

The court's application of these particular "policy considerations" was erroneous for several reasons.

First, they are outside the tests prescribed by the conflicts rules ("significant relationship"; "governmental interest"; "comparative impairment") of the states whose conflicts law the court was supposed to be applying.

Secondly, the court's concern about corporate moves during litigation being contrived to limit plaintiffs' rights is not a factor here. The move had been decided upon in November 1978. The move, moreover, if it were related at all to punitive damages would only have increased plaintiffs' rights at the expense of the respondent corporation.

Thirdly, if the court is concerned about contrived or artificial attempts to avoid choice of law consequences by moving, it would be a simple enough matter to hold that any such contrived effort would not be effective in derogation of plaintiffs' rights.

For example, if the corporate move here was from Texas to New York, and it was instigated after the accident, and by

reason of it, the court could simply hold that it would not extinguish plaintiffs' rights to punitive damages, since to do so would be to frustrate the Texas interest in controlling the conduct of its corporations.

The district court's holding that it will deny effect to a corporate move planned and largely executed before an accident because in other circumstances such a move might be contrived to deny plaintiffs' rights is like throwing the baby out with the bath water.

Furthermore, application of New York law is anomalous considering the fact that New York itself, under *Miller v. Miller*, would look to the law of Texas.

It would not be unreasonable in this age of judicial eclecticism in choice of law (*see* Leflar, *American Conflicts Law*, 3d Ed. §99, pp. 197-198; §108, pp. 219-222; §139, pp. 284-285) for the court to fashion a rule that would consider the *whole* law of a state, including its own conflicts rules.

Thus the court could hold that if it must look to New York law it will consider all of New York law, including its conflicts law as exemplified in *Miller v. Miller*.

Such a procedure would have the virtue in this case of providing a consistent rule of punitive damages for *both* defendants. ". . .[I]f uniformity of result is a major consideration in any case or type of case, use of a renvoi technique is a means of achieving it." Leflar, *American Conflicts Law*, 3d Ed., p. 10.

This approach makes particular sense when one focuses on the choice of law rationales we are dealing with. Under the "governmental interest" tests of California, New York, and Michigan, the court should apply the law of the state with the greatest interest in having its law applied.

As between New York and Texas, New York can hardly have the predominant interest in having its law applied when it has already expressed, in *Miller v. Miller*, the view that the place of present residence has the predominant interest.

Under California's comparative impairment refinement it could hardly be said that New York interests would be impaired by application of Texas law, when *Miller v. Miller* has announced a predominant interest in Texas.

And even under the significant relationship test of Illinois, as between the previous principal place of business and the present one, clearly the present one has the closer relationship.

Finally, the particular "policy considerations" chosen by the court below reflect an aspect of the vested rights theory, which most courts now reject.

III.

Assuming New York law is applicable to the issue of punitive damages against American, New York law violates the equal protection clause of the United States Constitution.

In *In Re Paris*, 427 F. Supp. 701 (C.D. Cal. 1977) the court held that a state's denial of punitive damages in death cases under circumstances where they are recoverable in injury cases is a denial of equal protection under the United States Constitution, Amendment 14.

This decision was reversed by a panel of the United States Court of Appeals for the Ninth Circuit, 622 F. 2d 1315 (1980). Certiorari was thereafter denied.

The district court's decision in *In Re Paris, supra*, was also rejected in *Huff v. White Motor Corp.*, 609 F. 2d 286, 297-298

(7th Cir. 1979). However, we believe that the treatment of this important question was perfunctory, and the court should review it.

Parham v. Hughes, 439 U.S. 815, 99 S. Ct. 75, 58 L. Ed. 2d 106, and *Vance v. Bradley,* 440 U.S. 93, 97, 99 S. Ct. 939, 943, 59 L. Ed. 2d 171 (1979) cited in *Huff,* are not on point. They are simply situations where the court found that there was a rational basis for the legislative classifications therein. There is no rationality, however, to allowing punitive damages where the victim lives and denying them where the victim dies.

The court in *Huff* also cited *Cyr v. B. Offen & Co.,* 501 F. 2d 1145, 1148-9 n. 2 (1st Cir. 1974). *Cyr, Mitseff v. Acme Steel Co.,* 208 F. Supp. 805 (N.D. Ill. 1962), and other cases cited by respondents below are distinguishable. They involved contentions by plaintiffs that it was a denial of equal protection to limit the amount of recovery in death cases but not in personal injury cases. They merely hold that the Legislature could treat death cases differently because their compensatory damage elements were different from those in personal injury cases. But punitive damages are the *same* in both types of cases. It is, therefore, irrational to permit their recovery in one case but not the other.

The question here is not whether a Legislature can place a limit on compensatory damages in a death case. The question, rather, is whether a Legislature can rationally distinguish between permitting punitive damages in one class of cases and not in the other, the purpose of punitive damages being the common purpose of deterring wrongdoing.

Petitioners believe that the court in *Huff* compressed many applications of the "rational basis test" into one, and then misapplied that one. Discriminations based on race are not the

only distinctions that violate the equal protection clause. *See Reed v. Reed,* 404 U.S. 71, 72 S. Ct. 251, 30 L. Ed. 225 (1971); and *McGowan v. Maryland,* 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). We think this Court should take another look at this question.

IV.

The United States Court of Appeals opinion is confusing and it does not give sufficient guidance in complex and prolix cases of this kind. This Court should grant certiorari to adequately resolve the confusion created by the opinion below.

In essence, the court below determined that when all other factors are equal, "the law of the place of the injury shall be used" but in looking to claims against American Airlines, the Seventh Circuit found that the law of the principal place of business and the law of the allegedly egregious conduct were in conflict.

The court further, rather anomously stated: "Again, we emphasize that this result in no way signifies a return to the mechanical, wooden law of *lex loci delicti.* Rather it emphasizes the fact that there must be some principled method of decision when the standard 'interest analysis' of conflicts law cannot settle the question." In the final analysis therefore, it is difficult to determine whether the court below actually has applied *lex loci delicti* without saying so, or whether it has created a "Chinese jigsaw puzzle" to be applied on an ad hoc, case by case basis.

It is manifest that the well-reasoned opinions of the district judges were not sufficiently rationalized by the court of appeals. It appears rather, that implicit in its opinion is the concern that punitive damages would be so great as to be confiscatory, and

thus bankrupt the corporation against which they are exacted. That further ought not to be a factor. We believe this Court should make a determination that where a logical cause can be made for the application of punitive damages, as is clear in the case at bar, that punitive damages be imposed without regard to "nice" questions of effect upon the defendant in the particular case. Justice is equally due to the hapless plaintiffs (petitioners herein).

To argue that a willful murder does not entitle the victim to punitive damages if he dies, but does if he is only grievously wounded (*e.g.*, New York) makes a mockery of the law altogether (*see* article of Aaron J. Broder, N.Y.L.J. 2/8/80, *The Death Penalty and Punitive Damages).*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

F. LEE BAILEY
AARON J. BRODER
Attorneys for Petitioners

HARRY B. FRANK
LESTER J. KRAVITZ
IRVING ANOLIK
Of Counsel

NOTE

SHUTAO H. LIN, as Administrator of the Goods, Chattels and Credits which were of SHU REN LIN, M.D., Deceased

JOSEPH P. MALACYNSKI, as Administrator of the Estate of MICHELLE MALACYNSKI, and JOSEPH P. MALACYNSKI, individually

DONALD R. LYON and SOPHIE H. LYON

JANE S. SHATKIN as Executrix of the Estate of LLOYD J. SHATKIN

SWIFT, Rita P. surviving spouse of William R. Swift; Rita P. Swift as mother and next friend of Lisa F. Swift

VAUGHAN, Sharon T. individually and as mother and next friend of Tena Ellen Vaughan

LLOYD'S BANK CALIFORNIA as Executor of the Estate of WILLARD R. NARY, Deceased

LLOYD'S BANK CALIFORNIA as Executor of the Estate

JULIA T. NARY

SUTTER, WILLIAM P. as Administrator of the estate of Ira S. Cohen, Deceased

BIELSKI, John
BIELSKI, Mary
BIELSKI, Michael

DITTMER, Carolyn Joan
individually and as mother
and next friend of Alicia
Dittmer and Brett Dittmer
and Keith Dittmer, individually

HAWKINS, Takako, individually
and as mother and next friend
of Clive Hawkins, an infant

ROTHFUSZ, Dries
and
VAN VIERSEN, Alida Rothfusz

GONZALEZ, Donna

GOLDSMITH, Catherine Gayle
GOLDSMITH, Kenneth, a minor
by Catherine Gayle Goldsmith
his guardian ad litem and
GOLDSMITH, Peter, a minor
by Catherine Gayle Goldsmith
his guardian ad litem

KRUPP, David Executor of
the estate of Judith Wax,
deceased

KRUPP, David Executor of
the estate of Sheldon S. Wax
deceased.

OHM, Gary R. as father and
next friend of Janella Ohm and
Jeffrey Ohm, minors

STACKS, Frederick D.
Administrator of the estate of
Margaret (Peg) A. Stacks,
deceased, and Frederick W.
Stacks and Margaret A. Stacks
individually

MORUZI, Richard J. Administrator
of the Estate of Debra A. Moruzi,
deceased

MALEK, Martin A., Administrator
of the Estate of DOREEN L.
MALEK, Deceased

HIGGINBOTHAM, MARY A. an
individual, MARY A.
HIGGINBOTHAM, and Guardian
Ad Litem for TODD P.
HIGGINBOTHAM, BRIAN E.
HIGGINBOTHAM, PAUL L.
HIGGINBOTHAM,

MULLER, PAULA S., individually
and as mother and next friend
of ANGELA LYNN MULLER and
MICHAEL TODD MULLER

GALLAGHER, GAYLE V. Administrator
of the Estate of KATHLEEN V.
GALLAGHER, Deceased

MAY, EDITH P. as mother of
JON D. MAY, Deceased

JAWOROWSKI, BERNARD
Administrator of the estate
of Ferdinand S. Jaworowski

ROGERS, Patricia L.
ROGERS, Thomas C.

SIMMONS, Sandra Kay

FRASCO, Nioma R.
TEMPE, Lucia A.

HILL, BETTY H., Widow and
as Administrator of the Estate
of EDWARD CHARLES HILL,
Deceased

GOLDENSOHN, Edith F., as
Executrix of the Last Will and
Testament of Kenneth Alan Green,
Deceased, and the Last Will and
Testament of Judith L. Green,
Deceased

PLATT Karen E., Special
Administratrix of the Estate of
Marcia E. Platt, Deceased
PLATT, Robert
PLATT, William E.

BEAN, Avon Personal
representative of the
estate of Jeannette E. Bean,
deceased,
BEAN, Avon, individually
BEAN, Michael A.
LAVANWAY, Ralph E.

CONNER, Donna, individually
and as mother and next friend
of Kathy Ann Conner, a minor

GLASS, Catherine H.
KEITH, Joanne Glass

BRAINE, Rosemary
BRAINE, Sharanne
BRAINE, Michelle
BRAINE, Lisa

BOHANAN, Clona
BOHANAN, Tanya, a minor
by Clona Bohanan, her
next friend

BRYSON, Dorothy Alma,
individually and as mother
and next friend of Laurel
Jane Bryson and Lesley Joan
Bryson, minors
BRYSON, Judith Lynne
BRYSON, Janet Lee

SIMMONS, Michael David
SIMMONS, John Harold
minors, by their guardian
ad litem Judy Lorenzen

VETOR, Andrew Administrator of
the estate of Narda Vetor
deceased, Andrew Vetor,
individually and Andrew Vetor
next friend of Derek S. Vetor,
Ryan A. Vetor and Rychee J. Vetor,
minor children

JIMENEZ, Pedro Rios
VELEZ, Luisa Gonzalez
GONZALEZ, Antonio Rios
GONZALEZ, Jose Rios
GONZALEZ, Hector Rios
GONZALEZ, William Rios

COUGHLIN, Christopher T.
a minor, by Dolores M. Coughlin
his guardian ad Litem

PILLIVANT, Marilyn Yvonne
personal representative of the
Estate of John E. Pillivant,
deceased

SCHRADER, Margaret, Special
Administrator of the Estate
of Charles M. Schrader,
Deceased

NATIONAL UNION FIRE INSURANCE
COMPANY, a corporation

McATEE, William C.
Administrator of the Estate
of Gordon C. McAtee, deceased

MITCHELL, Virginia
an individual

COUGHLIN, Beth A.
COUGHLIN, David P.
COUGHLIN, Mark A.
COUGHLIN, Laura S.

FILES, Lynne S. individually
FILES, Christopher Lynn
FILES, Michael Dale
FILES, Stephanie Nicole
minor persons, by and
Lynne S. Files, their
guardian ad litem

CANNON, Sandra Leigh,
Administratrix of the Estate of
CANNON, Robert Lamar, Deceased

CAMPBELL, Marleen, Personal
Representative of the Estate of
CAMPBELL, GERALD, Deceased

FRAXIER, Carol, individually
and as mother and next friend of
FRASIER, Pamela Ann
FRASIER, Stephen Lewis
FRASIER, Gail Hayes

HART, Richard as Executor
of the estate of George Hart
deceased; Annette Hart, his
widow; Georgann Zar, his Daughter;
Richard Hart his Son; and
William Hart, his son.

PLESA, CORINNE and MICHAEL
PLESA, as Co-Administrators
of the Estate of EILEEN M. PLESA,
Deceased

EATON, Merlene M. as
Administrator of the Estate
of Frederick G. Eaton,
deceased

VICKERY

CLARK, Margaret
DAVIS, Richard
Co-Administrators of the Estate
of Patricia Clark Davis,
Deceased

MIYAGAWA, Michael
PAULEY, Harleen, Personal
Representatives of the Estate
of MYRON MIYAGAWA, Deceased
EGGLESTON, Edna M.
MIYAGAWA, Kurt

HOLLENBECK, Frances D.
DOOLEY, H. Ray, Jr.
BURNETT, Vera Bb.
McPHERSON, Maude Dooley
DOOLEY, B.J.
DOOLEY, B. Frank
JENNINGS, Bertha
DOOLEY, T.S.
BEASLEY, Lillie Mae

WASHBURN, Juanita
DOOLEY, James R.
DOOLEY, W. K.
LONG, Jake B.
Surviving kin of
REBECCA WASHBURN

GOETZ, Ryan
GOETZ, Robert
Minors by and through their
Guardian Ad Litem
GOETZ, Linda and
GOETZ, Linda, individually

O'ROURKE, John G.
O'ROURKE, Joan T.

TRAUTMAN, Mary, widow and
personal representative of
Paul R. Trautmann, Deceased
TRAUTMANN, Julie
TRAUTMANN, Amy
children of Paul R. Trautmann,
deceased

RAGUCCI, Vicent J., Jr.,
as Administrator of the Estate
of Elena Crucioli, deceased

DZWONKOWSKI, Frances O.

BLOUIN, Judith A.
CHURCH, Robert A.

HOOVER, Lois
HOOVER, Margaret
HOOVER, Michael
HOOVER, Michelle
HOOVER, Mary

CLARK, Suzanne E. individually
and Guardian Ad Litem of
CLARK, Julie Ann, Minor
CLARK, Thomas W.
CLARK, Michael S.

CHARISSE, Nico, Widower and
Personal Representative of
Sheila Colleen Charisse,
Deceased

CRUCIOLI, Alexander, individually
and as Administrator D.B.N. of
the Estate of Mario A. Crucioli,
Deceased

GONZALEZ, Joseph L., Jr.
CHAVEZ, Margaret M.

WILLNER, Max
WILLNER, Irene, parents of
RONALD WILLNER

BOWER, Cathleen, individually
and as Administratrix of the
Estate of Edmund A. Bower,
Deceased

MOSK, Janet M.
MOSK, William Frank

KEENEY, Alberta
KEENEY, Mark Lawrence
KEENEY, Kathryn Elaine
KEENEY, ALBERTA as Guardian
ad litem of
KEENEY, Edward

FERNTHEIL, Albert T., Executor
of the Estate of CAROL ARNOLD
FERNTHEIL, Deceased

LUMBERMANS MUTUAL
INSURANCE COMPANY
A CORPORATION

CONTINENTAL CASUALTY COMPANY
a corporation

AMERICAN MOTORISTS INSURANCE COMPANY
a corporation

GEMME, LEILA B., Administrator
of the Estate of FRANCIS R.
GEMME, Deceased

KAMHI, Diane Irene
Individually, and as
Administratrix of the
Estate of MARC KAMHI,
Deceased, for herself and
on behalf of decedent's
infant daughter
LISA YVONNE KAMHI

KAHL, INGE MARIA, Widow and
Personal Representative of
HANS JURGEN KAHL, Deceased

KUSEK, Joan, Administrator
of the Estate of MICHAEL S.
SIROTA, Deceased

SPICUZZA, MERIKAY
Special Administrator of the
Estate of ROBERT SPICUZZA,
Deceased

LA SALLE NATIONAL BANK,
Special Administrator of
the Estate of Olin Hoskins,
Deceased

KIRK, Rita Van

VALADARES

BELLAVIA, Andrew and
BELLAVIA, Betty

MILNER, Marvin Sr., Father
and Special Administrator for
MARVIN MILNER, Jr., Deceased

LANG, Roy S. and
LOTZ, Robert F. Personal Representatives
of the Estates of E. STEPHEN LANG, Jr., and
SUSAN LANG, Deceased

CRAIG, Barbara
Individually, and as
Administrator of the Estate
of JOHN W. CRAIG

STATE NATIONAL BANK, Administrators of the Estates of
CHRISTOPHER S. SUTTON and
COLIN P. SUTTON, Deceased

STATE NATIONAL BANK, Administrator of the Estate of
CAROLYN M. SUTTON, Deceased

STATE NATIONAL BANK, Administrator of the Estate of STEPHEN P.
SUTTON, Deceased

ZIEMBA, THOMAS S., Personal
Representative of the Estates
of DIANE E. SIEMBA and JON
J. ZIEMBA, Deceased

SHERIDAN, THOMAS as Special
Administrator of the Estate of
MARY T. SHERIDAN, Deceased

HAIDER, Syed
as Administrator of the
Estate of Victoria Chen
Haider, Deceased

HUTH, KENNETH, As Personal
Representative and Executor
of the Estate of Henry C.
Magner, Deceased

HUTH, KENNETH, as Personal
Representative and Executor
of the Estate of VIRGINIA K.
MAGNER, Deceased

DICASTRO, Angeline J.
Administrator of the Estate
of Gail Anne DiCastro,
Deceased

DI PIETRO, John J., as
Administrator of the Estate
of DARLENE DI PIETRO, Deceased

LUX, LORA, Widow and
personal representative of
WALTER H. LUX, Deceased

BLAKE, MARIE, Mother

HAYNES, VIRGINIA, Sister of
STEPHEN BLAKE, Deceased

SCHADE, DONALD, as Administrator
of the Estate of ZAIDITA
SCHADE, Deceased

SCHADE, DONALD, as Administrator
of the Estate of MARJORIE SCHADE,
Deceased

SCHADE, DONALD, as Administrator
of the Estate of ZAIDA LOUISA SCHADE,
Deceased

SCHADE, DONALD, as Administrator of the
Estate of PAUL WILLIAM SCHADE, Deceased

FIRST BANK AND TRUST COMPANY
OF SOUTH BEND, as Administrator
of the Estate of HENRY FRANCIS
REGNERY, Deceased

BENNETT, HENRY as Special
Administrator of the Estate of
JUDITH BENNETT, Deceased

GREEN, ANN MARIE
Widow & as Administrator of the
Estate of Andrew D. Green, Deceased

DAVIS, CHARLES A., JR. as Special
Administrator of the Estate of
Marily Davis, Deceased

DE YOUNG, KATHLEEN, Mother and
Personal Representative of
RHONDA DE YOUNG, Deceased

AMERICAN NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
as Special Administrator of the
Estate of JULIE LOUISE
OZMINKOWSKI, Deceased

FIRST WISCONSIN NATIONAL BANK,
as Personal Representative of
the Estate of JOHN B. WEAR, JR.,
Deceased

FINK, SHARON Administrator of
The Estate of Larry M. Fink, Deceased

ADDUCI, PETER C. and
ADDUCI, LORRAINE V., co-
ADMINISTRATORS of the Estate
of KATHLEEN ADDUCI, Deceased

DI MICELLI, DIANE MARY,
Individually, and as Widow of
ROBERT JOSEPH DI MICELLI, Deceased

AMERICAN NATIONAL BANK & TRUST
COMPANY OF CHICAGO, as Special
Administrator of the Estate of
JONG BIN HAN, Deceased

THOMAS, ROBERT E.

HARLIN, JUDITH KAY, Widow,
Personal Representative and Special
Administrator of CHARLES THOMAS HARLIN
Deceased, and Mother and Next Friend of
ROBERT JOSEPH HARLIN and KRISTINE DAWN
HARLIN, Minors

GANSCHOW, Mary Loretta, as
Administrator and Personal
representative of the Estate
of MARGARET TYNE, Deceased

PECK, GREGORY, as Executor,
under the will of Donald
Optican, Deceased, resident
of New York

OPTICAN, BARBARA, Widow

OPTICAN, Scott L., Son

OPTICAN, Todd A., Son

OPTICAN, Marci E., Daughter,
a Minor, by B. Optican, her
mother and next friend

OPTICAN, TONI E. Daughter, a
Minor, by B. Optican, her
mother and next friend

OPTICAN, LILA, Mother of
Donald Optican, Deceased

ANTONELLI, CAROL, Administrator
of the Estate of DENNIS T. CONNELL,
Deceased

WINGER, CAROL, As Executrix of
the Estate of CARROLL D. BEGLEY,
Deceased; CAROL WINGER, individually;
BENSON, GAIL;
LANGE, GWEN

UDOVICH, DORIS C.
Executor of the Estate of
Alfred F. Udovich, Deceased

STOGEL, Myrna as Mother and
next friend of Gregor L. Stoger
and Lauren N. Stogel

NORDHAUS, GEORGE W.
NORDHAUS, KATHERINE S. individually
and on behalf of the heirs and estate
of Jeffrey W. Nordhaus, Deceased

AMERICAN NATIONAL BANK AND
TRUST COMPANY OF CHICAGO,
as Special Administrator of the
Estate of DON J. NOVELLI, Deceased,
Suing for and on behalf of PATRICIA NOVELLI,
LAUREL S. NOVELLI, and KENDELL E. NOVELLI

FIND, JACOB J. individually and
d/b/a J.J. Fink & Associates and
J. Fink, Inc. a corporation

TRAMELL, JAMES RICHARD
a minor by and through his guardian ad litem, Janice Marie Wright

RIDDLE, Gregory A., a minor by and through his Guardian ad litem Janice Riddle
RIDDLE, Allen O. Jr.
RIDDLE, Eleanor
RIDDLE, Kenneth
RIDDLE, Thomas
RIDDLE, Michael
RIDDLE, Mary

SCHOTS, MARC LAURENS
a minor by his next friend Helwig Rollema-Stater

WALKER, DAVID
WALKER, LONNA
WALKER, MICHELLE by their Guardian ad litem, Carolyn Walker

ATKINSON, ROBERT M.
GARDNER, ALYCE ATKINSON

ABDUL AZIZ AL SWAILEM
NORA AL SWAILEM
NORA AL OMAIR

SHARPE, Margaret B.
as widow and
MGUBLIAN, Marjorie A.
SHARPE, James W.
SHARPE, Charles V.
SMITH, Mary C. children

BEGLEY, CHERYL L.

CORRIGAN, Shirley Joan
CORRIGAN, Paul A.
CORRIGAN, Shirley Joan as
mother and next friend of
Linda J. Corrigan and
Carol R. Corrigan minors

MANNING, ROTHELL

PEREZ-BENABE, Santiago
and
PEREZ, AINO

FALCONE, VALENTINO JR.
EALY, Kimberly Su, a minor
by Valentino Falcone Jr. her
guardian ad litem
EALY, JOELL LYN a minor
by Valentino Falcone Jr. her
guardian ad litem and
EALY, ROBERT RONALD JR. a
minor by Valentino Falcone
Jr. his guardian ad litem

BENTOV, MIRTALA

DICK, NANCY S. individually
and as mother and next friend
Kathy S. Dick, Wendy G. Dick
and Brian S. Dick

STONE, June
STONE, Isadore
STONE, Jonathan
STTONE, June as mother and
next friend of Jeffrey Stone

SHEFFIELD, Elenore Ann
SHEFFIELD, Michael Frank
SHEFFIELD, Rebecca Ann
SHEFFIELD, Patricia Lynn

SHEFFIELD, James Carl
minors by and through their
Guardian ad litem Elenore Ann
Sheffield

DI CREDICO, Connie G.
DI CREDICO, Seana J.
a minor by her mother and
next friend Connie G. Di Credico
DI CREDICO, Angelina M. a
minor by her mother and next
friend Connie G. Di Credico
DI CREDICO, NICHOLE A. a
minor by her mother and next
friend Connie G. Di Credico

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 5, 1981

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 80-1812

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS
ON MAY 25, 1979

APPEAL OF: McDONNELL DOUGLAS CORPORATION.

No. 80-1813

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS
ON MAY 25, 1979

APPEAL OF: PLAINTIFFS IN ALL THE CONSOLIDATED CASES IN MASTER FILE NO. MDL 391.

No. 80-1814

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS
ON MAY 25, 1979

APPEAL OF: LLOYD'S BANK CALIFORNIA AS EXECUTOR OF ESTATES OF WILLARD R. NARY AND JULIA T. NARY, Deceased.

Appendix A

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. MDL 391—Edwin A. Robson & Hubert L. Will, *Judges.*

ARGUED SEPTEMBER 25, 1980—DECIDED JANUARY 5, 1981

Before SPRECHER, BAUER and CUDAHY, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This case presents complex conflicts-of-law questions regarding the allowance of punitive damages in wrongful death actions arising out of an air crash disaster. The law of the place of the disaster, the law of the place of manufacture of the airplane, and the law of the primary place of business of the airline do not allow punitive damages; but, the law of the primary place of business of the manufacturer of the airplane and the law of the place of maintenance of the airline do allow punitive damages. We find that, under each of the applicable state choice-of-law rules, punitive damages cannot be allowed against either the manufacturer or the airline.

I

The stark facts of the tragedy resulting in this litigation are undisputed. On May 25, 1979, a DC-10 jet airplane, designed and built by McDonnell Douglas Corporation ("MDC"), operated by American Airlines ("American") was scheduled to fly from Chicago, Illinois to Los Angeles, California as American's Flight 191. Shortly after takeoff from O'Hare International Airport, however, the plane lost an engine and crashed in the immediate vicinity of the airport. All two hundred seventy-one persons aboard the plane, and two persons on the ground, were killed.

Appendix A

Now there are one hundred eighteen wrongful death actions arising out of the crash. These cases were originally filed in Illinois, California, New York, Michigan, Hawaii, and Puerto Rico.[1] Many of the complaints allege wrongful death counts which request awards of punitive as well as compensatory damages. The plaintiffs and their decedents are and were residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Vermont, Puerto Rico, Japan, the Netherlands, and Saudi Arabia.

The defendants in these cases are MDC and American. MDC is a Maryland corporation having its principal place of business, now and at the time of the accident, in Missouri. The plaintiffs contend MDC's conduct in the design and manufacture of the DC-10 was egregious. That alleged misconduct occurred in California. American is a Delaware corporation. American's place of business prior to 1979 was New York. During 1979, American moved its principal place of business to Texas. Some plaintiffs contend that, on the date of the crash, American's principal place of business was in Texas, but American contends that its principal place of business on that date was New York. The plaintiffs contend that American's conduct regarding the maintenance of the DC-10 was egregious. That alleged misconduct occurred in Oklahoma, site of American's maintenance base.

Both defendants moved in district court to strike the claims for punitive damages on the ground that such claims failed to state legally sufficient claims for relief. The parties disputed many issues: whether certain states allowed punitive damages,

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1. The cases have been transferred to the Northern District of Illinois for pretrial purposes by order of the Judicial Panel on Multidistrict Litigation.

the choice-of-law theories to be used regarding certain states, and the results of the application of the choice-of-law theories which were used.

Using the choice-of-law rules of each state where these actions had originally been filed, the district court arrived at the following results. Under the Illinois "most significant relationship" test, the district court found that the law of the state of the principal place of business should prevail with regard to the issue of punitive damages. Finding that New York was American's principal place of business at the time of the crash and does not allow punitive damages, and that Missouri, MDC's principal place of business, does allow the equivalent of punitive damages, the court allowed the motions to strike punitive damage claims against American but not against MDC.

Under the California "comparative impairment" test, the district court held that the policies of the state of the principal place of business would be impaired more than the policies of the state of misconduct if those policies were not applied. Thus, the court allowed the motion to strike punitive damage claims with regard to American but not with regard to MDC. The district court reached the same result with regard to the actions filed in New York, Michigan, Puerto Rico, and Hawaii.

Although generally agreeing with the district court regarding which states allow punitive damages and the choice-of-law theories to be used, we reach a different result in applying those theories. For the reasons discussed below, we find that the motions to strike claims of punitive damages should be granted with regard to both MDC and American.

Appendix A

II

At the outset, we must first determine whether we confront "real" rather than "apparent" conflicts between the laws to be applied.[2] This requires a determination, first, of the law regarding punitive damages in the relevant states: Illinois, Missouri, California, Oklahoma, New York, Texas and Hawaii. After this determination, it will then be necessary to determine the conflict-of-law theories of the forum states and to apply those theories.

Illinois is the place of the injury and, under various theories, its law regarding punitive damages might be used. The Illinois Supreme Court has clearly held that Illinois does not permit the recovery of punitive damages in a wrongful death action. *Mattyasovszky v. West Towns Bus Co.*, 21 Ill. App. 3d 46, 313 N.E. 2d 496, 502 (1974), *aff'd*, 61 Ill. 2d 31, 330 N.E. 2d 509, 512 (1975).

Plaintiffs argue that the Illinois law on punitive damages is in a state of flux, citing recent cases allowing punitive damages in survival actions. *National Bank of Bloomington v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 160, 383 N.E. 2d 919 (1978); *Churchill v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 127, 383 N.E. 2d 929 (1978). But in these *Norfolk* cases, damages were sought

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2. *See* Currie, *The Disinterested Third State*, 28 L. & Contemp. Prob. 754, 757-58 (1963). Professor Currie's use of the terms "true conflict," "false conflict" and "apparent true conflict" refers specifically to his theory of government interest analysis. *See generally* Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 Cal. L. Rev. 577 (1980) [hereinafter referred to as Kay, *Comparative Impairment*. Our use of this terminology will not be so narrow. All laws must be carefully examined to determine that a conflict actually exists under any choice-of-law theory, before application of the theory.

under the Public Utilities Act, which expressly provides for punitive damages.[3] In *National Bank of Bloomington*, the Wrongful Death Act was not at issue; and in *Churchill*, the surviving plaintiff sought recovery for her own loss, not on the basis of the loss of life of her husband. The Illinois Supreme Court held in the *Norfolk* cases that where a statute specifically provides for punitive damages, nothing in the Survival Act, Ill.-Rev. Stat. ch. 3, §339 (1964) now Ill. Rev. Stat. §110½, par. 27-6 (1977), or in the *Mattyasovszky* decision operates to abate that *statutory* liability for punitive damages.[4] Thus, the *Norfolk* cases

3. The Public Utilities Act, Ill. Rev. Stat. 1969, ch. 111 2/3, §77 provides:

> [I]f the court shall find that the act or omission was willful, the court may in addition to the actual damages, award damages for the sake of example and by way of punishment.

4. The Illinois Supreme Court stated:

> In *Mattyasovszky*, where the decedent died instantly, his estate sought to recover punitive damages which the decedent, *under the common law*, might have recovered had he survived. The court summarily denied recovery of punitive damages because the Survival Act itself has "never been thought to authorize the award of punitive damages." . . . The court, however, did not base its denial of common law punitive damages on the broad proposition that punitive damages are unrecoverable when injury results in death. . . .
>
> Here, in contrast to *Mattyasovszky*, punitive recovery was sought, not under the common law, but directly under the Public Utilities Act. . . . The Survival Act itself neither authorizes nor prohibits punitive damages. It is merely the vehicle by which the cause of action, created by the Public Utilities Act, survives the death of the injured person when the action would otherwise have abated at common law.

383 N.E.2d at 924 (emphasis in original).

do not vitiate the holding of the *Mattyasovszky* case. Moreover, the argument that the *Norfolk* cases overturned the rule against recovery of punitive damages in a wrongful death action was impliedly rejected by an Illinois court in *Rusher v. Smith*, 70 Ill. App. 3d 889, 388 N.E. 2d 906, 911-12 (1979).[5] To be sure, the *Rusher* case is not binding because it is an Appellate Court decision. But it does nothing to detract from the voice of the Illinois Supreme Court in *Mattyasovszky*. That declaration of state law is, of course, binding on this Court. *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938).

Whether Missouri, MDC's principal place of business, allows the equivalent of punitive damages is hotly disputed by the litigants. Although Missouri's wrongful death act does not by its express terms provide for punitive damages, Mo. Ann. Stat §§537.080 *et seq.* (Vernon 1979), it does authorize the trier of fact to consider the "mitigating or aggravating circumstances attending the death." Mo. Ann. Stat. §537.090 (Vernon 1979). Damages for "aggravating circumstances" have been permitted by Missouri wrongful death statutes since 1855, and have consistently been considered punitive or exemplary by the Missouri Supreme Court. *Parsons v. Missouri Pacific Ry.*, 94 Mo. 286, 6 S.W. 464, 466-67 (1888); *Haehl v. Wabash Ry. Co.*, 119 Mo. 325, 24 S.W. 737, 741 (1893). Damages for "aggravating circumstances" in death cases depend on proof of

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5. The majority opinion stated that "[t]he law is well settled that a party cannot recover punitive damages in a wrongful death action in Illinois." The majority cited *Mattyasovszky* but did not discuss the *Norfolk* cases. 388 N.E.2d at 911-12. But the dissent had cited both *Mattyasovszky* and the *Norfolk* cases for the proposition that it was *not* "well-settled that a party cannot recover punitive damages in a wrongful death action in Illinois." *Id.* at 912. Thus, the majority opinion rejected the argument that the *Norfolk* cases changed the law barring punitive damages in wrongful death cases.

"willful misconduct, wantonness, recklessness, or want of care indicative of indifferences to consequences," *Wiseman v. Missouri Pacific Railroad*, 575 S.W. 2d 742 (Mo. App. 1978), a standard commonly associated with the award of punitive damages.[6]

MDC argues that the case of *Glick v. Ballentine Produce Inc.*, 396 S.W. 2d 609 (1965), *appeal dismissed*, 385 U.S. 5 (1966), conclusively establishes that damages awarded because of "aggravating circumstances" are *not* punitive. But MDC's argument, based on selective quotation, is not persuasive. In *Glick*, a wrongful death case, the plaintiffs attempted to recover damages in excess of the then existing statutory monetary limit. The Missouri Supreme Court disallowed the excess amount requested. In so doing, the Missouri Court stated that there was no recovery under Missouri law for punitive damages, "as such," but that "aggravating circumstances" could be considered by the jury so long as the total verdict did not exceed the statutory limit. 396 S.W. 2d at 616-17.[7] Thus, we find, and the *Glick*

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6. *See also Williams v. Excavating and Foundation Co.*, 230 Mo. App. 973, 93 S.W. 2d 123, 127 (1936) ("to whatever extent the damages are increased by reason of aggravating circumstances attending the death of the deceased, such increase is punitive in its nature. . . .") and *Contestible v. Brookshire*, 355 S.W. 2d 36, 42 (Mo. 1962), *cert. denied* and *appeal dismissed*, 371 U.S. 68 (1962).

7. The court stated:

> There is no recovery in a death case for punitive damages, as such. Such a petition may plead, and appropriate instructions may submit, the question of "mitigating or aggravating circumstances," if the evidence justifies it. *Williams v. Excavating & Foundation Co.*, 230 Mo. App. 973, 93 S.W.2d 123, 127; *Hertz v. McDowell*, 358 Mo. 383,

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decision is not inconsistent with our finding, that the damages allowed under Missouri law with regard to "aggravating circumstances" can be considered within the meaning of "punitive" damages as sought by the plaintiffs.

California is the place of MDC's conduct in the design and manufacture of the DC-10. California courts have uniformly held that the statute which allows punitive damages generally in tort actions[8] applies with regard to survival actions only and not with regard to wrongful death actions. *See Tarasoff v. Regents of the University of California,* 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 33, 551, P. 2d 334, 353 (1976); *Pease v. Beech Aircraft Corp.,* 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); and Note, 15 Santa Clara Law., 507 (1975). *See also In Re Paris Air Crash,* 622 F. 2d 1315 (9th Cir. 1980). Although the plaintiffs question the strength of this policy, *see* discussion in Part VI, they do not question the fact that the California courts do deny punitive

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> 214 S.W.2d 546. While added damages because of "aggravating circumstances" may, in a sense, be considered as punitive in nature, they are not to be submitted as such nor are they to be submitted separately, *nor in any total verdict and judgment to exceed the statutory limit. Within that total limit the jury may exercise a broad discretion.*

396 S.W.2d at 616-17 (emphasis added) (emphasized material was deleted in MDC quotation).

8. Cal. Civil Code, §3294 (West, 1970), provides:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

damages in death cases. Pl. Br. 80-1812, at 35. Thus, we find that California law does not allow punitive damages in wrongful death cases.

Oklahoma is the site of American's maintenance headquarters. The parties do not dispute the fact that Oklahoma does allow punitive damages. 12 Okla. Stat. Ann. 1053(C) (1979-80 Cum. Supp.)

New York was American's principal place of business during part of 1979. We find that New York does not allow an award of punitive damages in wrongful death actions. *See Robert v. Ford Motor Co.*, 424 N.Y.S. 2d 747 (1980); *Barrett v. State*, 85 Misc. 2d 456, 378 N.Y.S. 2d 946 (Ct. Claims 1976). *See also* N.Y. Est., Powers & Trusts L. §5-4.3 (McKinney 1967).

Texas was American's principal place of business during part of 1979 and has been its principal place of business thereafter. It is undisputed that Texas does allow a punitive damage recovery, by spouses or descendants, in wrongful death actions. *See* Tex. Const. Art. 16 §26 (1976). *See also Scoggins v. Southwestern Elec. Service Co.*, 434 S.W. 2d 376 (Tex. Civ. App. 1968); *Pace v. McEwen*, 574 S.W. 2d 792 (Tex. Civ. App. 1978).

Hawaii is the domicile of one of the plaintiffs; one action was originally filed there. The parties have not been able to identify the governing choice-of-law rule that would be applied by Hawaii courts in personal injury actions. The defendants argue that, absent an affirmative showing to the contrary, a court should presume that the forum state would apply its own law concerning punitive damages in a wrongful death action. The Hawaii law regarding punitive damages will be discussed in Part X of this opinion.

Appendix A

In summary, we find that the "line-up" of the states involved regarding the issue of punitive damages is as follows: Illinois, place of the injury, does not allow punitive damages. Missouri, MDC's principal place of business, does allow punitive damages, but California, place of MDC's conduct, does not. New York, one principal place of business of American, does not allow punitive damages while Texas, another principal place of business of American, does. Oklahoma, the place of American's conduct, does allow punitive damages.

III

It is now, necessary to examine the constitutional objections to the disallowance of punitive damages. For there would be no conflict at all if it is unconstitutional to disallow punitive damages in wrongful death actions.

In the district court below, plaintiffs raised two general constitutional objections. First, they argued that the preclusion of punitive damages in wrongful death actions, where they are permitted in personal injury survival actions, is a violation of the equal protection clause of the federal and of the Illinois, Michigan, and California constitutions. In addition, certain plaintiffs argued that the existence in Illinois of the difference in damages between survival and wrongful death actions represents "special legislation" of the type prohibited by Art. 4, §13 of the Illinois Constitution. The district court rejected both arguments.

On this appeal, the only specific constitutional attack is the argument that New York's denial of punitive damages violates the federal equal protection clause. Proceeding to the federal equal protection analysis, we affirm, for the reasons below, the district court's holding that statutes which deny punitive

damages in wrongful death cases but allow such damages in other personal injury actions do not run afoul of the federal Constitution.[9]

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9. The district court first held that the equal protection clauses of the Illinois and Michigan constitutions were coextensive with the equal protection clause of the federal constitution, *citing Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 367 N.E. 2d 1325 (1977); *Commissioners of Highways of Town of Annawan v. United States*, 466 F. Supp. 745, 769 (N.D. Ill. 1979); *Moore v. Spanglar*, 401 Mich. 360, 258 N.W. 2d 34 (1977).

The district court then turned to California. It found that the California equal protection clause was fundamentally equivalent to that of the federal Constitution but that it required "some rationality" in the nature of the class singled out. The court held that the denial of punitive damages was rational and that, therefore, such denial did not offend the California constitution.

Finally, the district court examined the prohibition of "special legislation" in the Illinois Constitution, Art. 4, §13. The court rejected the argument that Illinois' denial of punitive damages constituted "special legislation," *citing Smith v. Hill*, 12 Ill. 2d 588, 147 N.E. 2d 321 (1958); *Siegall v. Soloman*, 19 Ill. 2d 145, 166 N.E. 2d 5 (1960); *Adams v. Continental Cas. Co.*, 21 Ill. App. 3d 111, 314 N.E. 2d 495 (1974), *aff'd McRoberts v. Adams*, 60 Ill. 2d 458, 328 N.E. 2d 321 (1975); *Rincon v. License Appeal Commission of City of Chicago*, 62 Ill. App. 3d 600, 378 N.E. 2d 1281 (1978); and *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 367 N.E. 2d 1325 (1977).

The plaintiffs do not directly challenge any of these findings by the district court. Illinois plaintiffs Plesas do, however, raise some arguments which, *inter alia*, imply a challenge based on Illinois constitutional grounds. The Plesas' first argument is not a constitutional argument but a response to MDC's argument that Illinois would refuse to enforce Missouri's law allowing punitive damages. They argue that it is not the case that Illinois would refuse to enforce Missouri's law. Since our analysis of the conflicts issue does not rely on this MDC argument, we do not reach the Plesas' first argument.

The Plesas' second argument seems to be that the denial of punitive damages is unconstitutional under Illinois law. But they do not press this

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Appendix A

The wrongful death statutes in question involve a legislative classification which allows punitive damages in certain personal injury actions but denies punitive damages in wrongful death cases. This classification does not involve any suspect class. *See Parham v. Hughes*, 441 U.S. 347, 351 (1979) and *Huff v. White Motor Corp.*, 609 F. 2d 286, 298 (7th Cir. 1979). Nor does this classification affect fundamental rights. *See Huff*, 609 F. 2d at 298. Thus, the classification is not to be examined with "strict" or even "intermediate" scrutiny[10] but is to be examined by the

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argument as such. Rather, they seem to argue that this Court should abstain from deciding the Illinois constitutional challenge and allow Illinois courts to decide it. Plaintiffs request abstention under Circuit Rule 13 of this Court which provides the power to certify "questions arising under the laws of that state which will control the outcome of a case pending in federal court." This second argument, then, presents two issues for resolution by this Court.

First, because we are not confronted with a specific challenge to the district court's finding that the Illinois equal protection guarantee is coextensive with the federal equal protection guarantee, we decline to disturb the district court's finding.

Second, we find that abstention is not appropriate. As the United States Supreme Court stated in *Babbitt v. Farm Workers*, 442 U.S. 289, 306 (1979), a case cited by the Plesas, there is a fundamental prerequisite for abstention. "[T]he abstention doctrine 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.'" *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). But as we discussed in Part II, we do not find the issue of whether Illinois denied punitive damages to be uncertain. To the contrary, we find the Illinois Supreme Court's affirmation of *Mattyasovszky* clear authority for the fact that Illinois does deny punitive damages in wrongful death cases. Thus, we decline plaintiffs' invitation to abstain.

10. In *In re Paris Air Crash*, 622 F.2d 1315, 1319 n.4 (1980), the Ninth Circuit Court of Appeals held that the "rational relationship" test—and not

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"rational relationship" test. The classification must be rationally related to a legitimate state purpose in order to pass constitutional muster with regard to the equal protection clause. *Huff; Parham; Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1979); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); and *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Recently, this Court considered this same issue in *Huff*, 609 F. 2d 286, which involved an equal protection challenge to Indiana's wrongful death statute. That law, like the laws challenged here, allowed punitive damages in other personal injury cases but not in wrongful death cases. In *Huff*, we found the legislation was rationally related to a legitimate state interest and therefore passed equal protection scrutiny. The plaintiffs here argue that the treatment of this question in *Huff* was

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any higher level of scrutiny—should be used in examining the denial of punitive damages in wrongful death actions. The court stated:

> We do not apply a middle-tier analysis for three reasons. First, both state and federal Supreme Courts have declined frequent invitations to announce or articulate such an analysis. Second, both courts have analyzed tort recovery limits in terms of a rational bearing upon a legislative objective. Third, the relatively nongrievous deprivation, if indeed it can be called such, of a limit on who may act as a private attorney general by seeking punitive damages makes this case particularly inappropriate to inaugurate such an analysis. Additional drawbacks of this proposed innovation are discussed in *Hawkins v. Superior Court*, 22 Cal. 3d 584, 607-10, 150 Cal. Rptr. 435, 450-51, 586 P.2d 916, 931-32 (1978) (Bird, C.J., concurring); Linde, *Due Process of Law Making*, 55 Neb. L. Rev. 197 (1976).

622 F.2d 1315, 1319 n.4.

perfunctory and request that we review the question again. We agree the discussion of this issue in *Huff* was not elaborate. But in reexamining the issue, we reach the same result.

Very recently, the Ninth Circuit Court of Appeals confronted a similar equal protection challenge to a state's denial of punitive damages in wrongful death actions. In its decision in *In Re Paris Air Crash*, 622 F. 2d 1315 (9th Cir. 1980), the Ninth Circuit found the classification denying punitive damages to survive the rational relationship test. We find the Ninth Circuit opinion persuasive and reach the same result here for the following reasons.

First, the United States Supreme Court recently has sustained tort liability limitations in *Duke Power Co. v. Environmental Study Group*, 438 U.S. 59 (1979), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In those cases, the damage limitations were more severe than the damage limitation here. There, the challenged laws, limited the types or amounts of *compensatory* relief. Here, the limitation is the denial of *punitive* relief; compensatory damages are unaffected. Thus, the limitations themselves are not irrational.

Second, the purpose of denying punitive damages is to avoid excessive liability. Such denial represents a legislative determination that a state's interest in protecting defendants from excessive damages outweighs its interest in punishing or deterring misconduct. *See In Re Paris Air Crash*, 622 F. 2d at 1319, and *Jackson v. K.L.M.*, 459 F. Supp. 953, 956 (S.D.N.Y. 1978). The state has legitimate interests in both the amount of damages paid to survivors of persons wrongfully killed and in

protection of defendants.[11] The denial of punitive damages is clearly a rational method of limiting damages in wrongful death cases. *See In Re Paris Air Crash*, 622 F. 2d at 1319. For these reasons, then, we find that a state's decision to limit punitive damages does pass constitutional muster under the rational relationship test. We note also that in every case of which we are aware, every court which has confronted this question has arrived at this same conclusion. *See, e.g., In Re Paris Air Crash; Huff; Johnson v. International Harvester Corp.*, 487 F. Supp. 1176 (D.N.D. 1980); and *Robert v. Ford Motor Co.*, 73 App. Div. 2d 1025, 424 N.Y.S. 2d 747 (1980).[12]

IV

We now confront the actual conflicts issues among the various states. It is not disputed that, since federal jurisdiction is based on diversity of citizenship, the choice-of-law rules to be

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11. A state may even determine, for example, that its interest in maintaining accurate and efficient disposition of property at death is best served by limiting damages to exclude punitive damages. *See Parham v. Hughes*, 441 U.S. at 357.

12. Finally, plaintiffs argue that this Court must find the denial of punitive damages in wrongful death cases unconstitutional because, so long as this denial continues, there will continue to be some truth to the adage that "it is cheaper to kill a victim than to injure him." Unfortunately, this adage has become an adage *because* there is some truth to it.

The decision of under what circumstances punitive damages should be allowed is for the state legislatures and not this Court. Neither with regard to the constitutional argument, nor with regard to the conflicts analysis, do we take into consideration the wisdom of specific decisions regarding punitive damages.

used are those choice-of-law rules of the states where the actions were originally filed. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *VanDusen v. Barrack*, 376 U.S. 612 (1964); *In Re Air Crash Disaster of Boston, Massachusetts*, 399 F. Supp. 1106 (D. Mass. 1975). We will consider the law of each state in turn. We emphasize at the outset that the tests to be used, although containing significant differences, mandate an analytical inquiry which is basically the same. As Professor Leflar has stated:

> [I]t appears that the various scholarly views concerning choice of law, developed during the last couple of decades, are being accepted by the courts as though they constituted one somewhat multi-faceted approach to the subject. Essentially, they are consistent with each other. Any one of them is likely to produce about the same result on a given set of facts as will another . . . .
>
> The point to be emphasized is that the modern decisions, regardless of exact language, are substantially consistent with each other.

Leflar, American Conflicts Law, §109, p. 218 (3d ed. 1977).

In general, we must attempt to determine which, if any, of the states having some relationship to the parties or to the crash has the most significant interest in the application of its own substantive law to the merits of the punitive damage issue. The application of choice-of-law rules is not a mechanical process of cranking various factors through a formula. Critical to conflicts analysis is the notion that we must examine the choice-of-law rules not with regard to various states' interests in general, but

precisely, with regard to each state's interest in the specific question of punitive damages. Thus, we approve the concept of "depecage": the process of applying rules of different states on the basis of the precise issue involved.[13]

The depecage process has recently been approved and utilized by the Court of Appeals for the Third Circuit in an aircraft products liability case involving a choice between standards of liability. *Reyno v. Piper Aircraft Co.*, No. 79-2747 (3d Cir. 1980), *petit. for cert. filed*, 49 U.S.L.W. 3429 (Dec. 9,

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13. In our case, there is only one relevant issue: the choice of law regarding punitive damages. Thus, we use the term here to mean a precise focus on the purpose of and policies behind the decision to either allow or disallow punitive damages. *See* Reese, *Depecage: A Common Phenomenon In Choice of Law*, 73 Colum. L. Rev. 58, 59-60 (1973). Professor Reese stated:

> Amidst the chaos and tumult of choice of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most approximately be applied to govern the particular issue. . . .
>
> It also seems probable that greater use of depecage will be an inevitable by-product of the development of satisfactory rules of choice of law. In contrast to the broad rules that have been tried and found wanting, the new rules, if we are indeed to develop such rules, are likely to be narrow in scope and large in number. . . .
>
> In short, a willingness to make a liberal use of depecage would seem a prerequisite to the satisfactory development of narrow rules of choice of law.

1980) (No. 80-848).[14] Depecage has also been endorsed by many conflicts scholars.[15] The task of conflicts analysis using depecage requires creativity and precision. With this admonition in mind, we begin our analysis.

V

We begin with the actions filed in Illinois. The Illinois courts apply the "most significant relationship" test of the Restatement (Second) of Conflict of Laws ("Restatement (Second)") to determine the applicable law in wrongful death actions. This test incorporates a presumption that the local law of the state where the injury occurred should govern, unless another state has a "more significant relationship" to the occurrence or to the parties.[16] *Ingersoll v. Klein*, 46 Ill. 2d 42, 48, 262 N.E. 2d 593, 596 (1973).

14. Referring to depecage and the Reese article, *id.*, the court said, with regard to California choice-of-law:

> Although the California Supreme Court has not explicitly adopted this method, it is implicit in that court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the balance of comparative interests may vary.

Reyno, slip op. at 29-30.

15. *See* Reese, *Depecage, id.*; Leflar, *American Conflicts Law*, §109, p. 221-22 (3d ed. 1977) *citing* Wilde, *Depecage in the Choice of Tort Law*, 41 S. Cal. L. Rev. 329 (1968).

16. The Restatement (Second) §175, §178 (1971) provides as follows:

> §175. Right of Action for Death. In an action for wrongful

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Appendix A

The Restatement (Second) provides two sets of criteria for the measurement of the "most significant relationship." The first set of criteria includes general factors such as the needs of the interstate system; relevant policies of the forum and other interested states; protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.[17] The

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death the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.

§178. Damages. The law selected by application of the rule of §175 determines the measure of damages in an action for wrongful death.

17. The Restatement (Second), §6, (1971), provides:

§6 Choice of Law Principles

(1) A court, subject to constitutional restriction, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectation,

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second set of criteria includes the contacts to be taken into account in applying these principles. These contacts are: (1) the place of the injury; (2) the place of misconduct: (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered.[18] These contacts are to be

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(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

18. The Restatement (Second), §145, provides:

§145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

evaluated according to their relative importance to the issue involved and according to the purposes sought to be achieved by the relevant rules of the interested states.[19]

A

Turning to defendant MDC, the precise issue, of course, is which state's law regarding the availability of punitive damages should apply. The states having contacts to be taken into account are: Illinois, place of injury; California, place of MDC's alleged misconduct; Missouri, MDC's principal place of business; and, if it can be determined, the states where the relationship between the parties is centered.

It is unclear where the relationship of the parties is "centered". As the district court noted, most of the Illinois actions involve Illinois decedents who purchased their tickets in Illinois for a flight which began in Illinois. But the flight was *to* California. Surely the importance of the place of destination of a journey is just as great as the importance of the place of departure. This issue need not detain us, however, because neither California nor Illinois allows punitive damages.[20]

We next turn to the interests of the states of domicile of the plaintiffs. The domiciliary states do not have an

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19. *See Id.*, §145, Comment c, at 416-17.

20. Moreover, the place where the relationship is centered would seem to have a low interest in either punishment or protection merely because the parties' relationship was centered within its borders. The alleged egregious acts would not have occurred there; thus, the state would have a low interest in controlling nonresident corporate behavior. Also, because the corporations were not located in that state, it would have a low interest in the protection of nonresident defendants.

interest in disallowing punitive damages because the decision to disallow such damages is obviously designed to protect the interest of resident defendants, not to effectuate the interest of the domiciliary states in the welfare of plaintiffs. *E.g., Hurtado v. Superior Court,* 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666, 670 (1974).

Nor do the domiciliary states have an interest in imposing punitive damages on the defendants. The legitimate interests of these states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries. *E.g., Hurtado,* 11 Cal. 3d at 584, 114 Cal. Rptr. at 112, 522 P.2d at 672. Those interests are fully served by applying the law of the plaintiffs' domiciles as to issues involving the measure of *compensatory* damages (insofar as that law would enhance the plaintiffs' recovery) and the distribution of any award. Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those states are satisfied.

We thus return to the interests of the three relevant states, Illinois, California, and Missouri. Illinois and California do not allow punitive damages but Missouri does. If the interests of these three states were to be weighed equally, the tally would be two-to-one against allowing punitive damages. But the process of weighing states' interests requires more than merely tabulating the states pro and con. We must examine the precise interest of each state with regard to the purpose of punitive damages.[21]

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21. For this reason, we reject the defendants' "grouping" theory. Defendants argue that because the law of the place of injury and the law of the place of misconduct are the same, the case must be analyzed for choice-of-law

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Appendix A

The purposes underlying the allowance of punitive damages, as the district court noted, are punishment of the defendant and deterrence of future wrongdoing. The purpose underlying the disallowance of punitive damages is protection of defendants from excessive financial liability. Two states which very definitely have an interest in punishment or protection are California and Missouri, the states in which, respectively, the conduct occurred and the principal place of business is located. Both states have an obvious interest in preventing future misconduct; both states have an obvious interest in protecting businesses located or acting within its borders. Illinois, the place of injury, also has an interest in the punitive damages question; its interest will be discussed after the discussion of Missouri's and California's interests.

MDC's wrongful conduct here complained of involved the design and manufacture of the DC-10. Because the corporate headquarters of MDC is located in Missouri, Missouri has an

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purposes as if conduct and injury occurred in the same state. Then, defendants argue, punitive damages must be disallowed. But the very "grouping" process that defendants advocate would vitiate the entire process of weighing states' interests. The result of defendants' approach would be the application of rules as wooden and mechanical as the old *lex loci delicti* rule itself, which the Restatement (Second) balancing process is designed to supplant. The Restatement (Second) §6, at 14, states:

> In determining a question of choice of law, the forum should give consideration not only to its own relevant policies . . . but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law apply.

obvious interest in deterring wrongful conduct in such design and manufacture, even if the actual work was performed in California. To find otherwise would be to gut the very concept of corporate accountability. Moreover, to say that Missouri has *no* interest in the imposition of punitive damages—as defendants do—would encourage rampant subterfuge and confusion. For example, many corporations have corporate headquarters in one state and far-flung operations in many others.[22] If courts held that the place of "conduct" had the critical interest in punitive damages and that the place of corporate headquarters had no interest in punitive damages, then litigation would center around exactly where activities and decisions occurred. The practical effect of such a holding would be to require extensive examinations of numerous employees and to require complex investigations into the precise locations of many areas of corporate decision. Corporations seeking to avoid potential punitive damages would be encouraged to structure decisions so that no specific locus for a major decision could ever be proved to have occurred in a "punitive" state.

MDC argues that *Jackson v. K.L.M.*, 459 F. Supp. 953 (S.D.N.Y. 1978) and *Sibley v. KLM-Royal Dutch Airlines*, 454 F. Supp. 425 (S.D.N.Y. 1978) establish the proposition that, as between the state of misconduct and the primary place of business, the state of misconduct is the only state with an interest in awarding punitive damages. Citing these cases, it argues that Missouri, as the state of its corporate headquarters and principal place of business, has an interest only in the decision to disallow punitive damages but not in the decision to allow punitive damages. But the defendants misread the *Jackson*

22. In this case, for example, American maintained its corporate headquarters in New York, its operations base in Texas, its maintenance department in Oklahoma, and conducts business throughout the country.

and *Sibley* opinions and their argument seems comparable to "heads, I win; tails, you lose" logic.

Jackson and *Sibley* are companion cases which involved suits by representatives of decedents who had been domiciled in states allowing punitive damages. The suits were brought against a Dutch airline for personal injuries arising from an air crash in Spain. The holding for these cases was that the states of the decedents had a proper interest only in adequate compensation, but not in punitive damages. The only jurisdictions found to have an interest in punitive damages were the Netherlands, place of the airline's incorporation and principal place of business, and Spain, the country in which the accident and the tortious conduct occurred. But because both the Netherlands and Spain disallowed punitive damages, the court was not confronted with the need to determine whether the place of conduct had a greater or lesser interest than the principal place of business in the punitive damages question.[23] Thus, these cases do not provide

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23. The *Jackson* court did state that the domiciliary states had a lower interest in punitive damages than the place of injury because "the California Supreme Court had recognized that the interest in regulation of conduct in tort cases is primarily local, in character and is the concern of the jurisdiction in which the conduct occurred." 459 F. Supp. at 955. But the *Jackson* court did not use this reasoning to downplay the interest of the Netherlands, KLM's principal place of business. Nor did the court say that Spain and the Netherland s had an interest *only* in protecting KLM from excessive financial burdens. The court was not confronted with the question of the countries' interests had they chosen to allow the financial burdens of punitive damages. The court, which found for the defendants, characterized the defendants' argument as follows:

> KLM asserts that Netherlands, the place of KLM's incorporation and its principal place of business, and Spain, the country in which the accident occurred, are the only

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support for the argument that, in our case, Missouri has any less interest than California.

California, place of MDC's conduct in manufacture and design of the DC-10, also has a strong interest in the issue of punitive damages. California, as does every state, has a substantial interest in the economic health of corporations which do business within its borders. It derives substantial sales and income taxes, as well as other revenues, directly and indirectly from a corporation's activities within the state. Indeed, California's interest is strong with regard to a rule disallowing punitive damages because such a rule protects the economic well-being of the corporations and therefore enhances the economic well-being of the state. Moreover, the rule may have been a factor in various corporations' decisions to move to California.

The district court concluded that where, with regard to punitive damages, the law of the principal place of business conflicted with the law of the place of misconduct, the former should prevail. The court reasoned that responsibility for corporate conduct should be uniform, regardless of where individual instances of that conduct took place. But the district court's analysis only looked at the purpose behind the decision to *allow* punitive damages. As we have discussed, both the decision to allow punitive damages and the decision to disallow punitive damages must be accorded great respect.

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jurisdictions with a significant interest *in the issue of punitive damages.*

459 F. Supp. at 955 (emphasis added). By the use of the phrase "issue of punitive damages," presumably the defendants' argument, which the court had accepted, would also have been accepted had the countries allowed punitive damages.

Thus, we find that the balance on the scales of significant contacts is even: we cannot say that either California or Missouri has a "greater" interest in the decision whether to allow punitive damages against MDC. This situation involves a total and genuine conflict: one jurisdiction allows punitive damages, the other does not. There does not seem to be any way to arrive at a "moderate and restrained" interpretation of either policy so as to avoid a true conflict.[24]

With the scales evenly balanced, we now turn to the interest of Illinois, the place of injury. The old rule in many jurisdictions, developed from torts other than air crashes, was that where there was nothing fortuitous about the fact that the injury occurred in a given state, great weight would be given to the law of the place of injury. But air crash disasters often present situations where the place of injury is largely fortuitous. *See Cousins v. Instrument Flyers, Inc.*, 44 N.Y. 2d 698, 405 N.Y.S. 2d 441, 443, 376 N.E. 2d 914 (1978), and sources cited therein. That the injury in our case occurred in Illinois can only be described as fortuitous. Had the DC-10's engine fallen off later, the injury might have occurred in one of any number of states. Because the place of injury is much more fortuitous than the

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24. Kay, *Comparative Impairment, supra*, note 2, at 578, *quoting* W. Reese & M. Rosenberg, Cases and Materials on Conflict of Laws 470 (7th ed. 1978). Also, we are unable to fathom a procedural compromise, such as a shift in the burden of proof, which could accommodate both policies. *See* Twerski & Mayer, *Toward a Pragmatic Solution of Choice of Law Problems — At the Interface of Substance and Procedure*, 74 Nw. L. Rev. 781 (1979); Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of law Problems*, 7 Hofstra L. Rev. 807 (1979). Nor are we able to determine a consensus on shared values or policies which could lead to a compromise. *See* Trautman, *A Comment on Twerski and Mayer: A Pragmatic Step Towards Consensus As a Basis For Choice-of-Law Solutions*, 7 Hofstra L. Rev. 833 (1979).

place of misconduct or the principal place of business, its interest in and ability to control behavior by deterrence or punishment, or to protect defendants from liability, is lower than that of the place of misconduct or principal place of business. Also, merely as the place of injury, Illinois would not have strong interests in protecting nonresident defendants from excessive financial liability.

But the fact that the interest of the place of injury is less than the interest of the principal place of business and the interest of the place of alleged misconduct does not mean that Illinois has *no* interest in the punitive damages question. Illinois has very strong interests in not suffering air crash disasters and also in promoting airplane safety. This Court takes judicial notice that the DC-10 crash sent shock waves throughout the metropolitan Chicago area. Illinois special emergency disaster units responded to the crash. The state certainly incurred significant expense in attempted rescue operations, clean-up operations, and the necessary tasks of identifying the deceased and notifying next-of-kin.

Also, in this case Illinois is more than merely the place of injury. As noted before, many of the other contacts of significance were in Illinois. With regard to the actions filed in Illinois, all but two of the decedents resided in Illinois. As the home of O'Hare International Airport, one of the world's busiest airports, Illinois certainly has strong interests in encouraging air transportation corporations to do business in the state.

Because Illinois has such strong interests in promoting airline safety, it would have a strong interest in allowing punitive damages to deter corporate misconduct relating to air safety. But because Illinois also has such strong interests in having airlines fly into and out of the state, and having related air

transportation companies do business within the state, it would have a strong interest in protecting air transportation companies by disallowing punitive damages. Thus, the decision made by the Illinois legislature must be accorded special weight.

As noted earlier, Illinois' choice-of-law law gives presumptive importance to the place of injury. The law of the place of injury is to be supplanted only when another state has a more significant relationship than the place of injury. Restatement (Second) §175. Although either California or Missouri, taken separately, would have a greater interest than Illinois, the fact that the laws of these states are in absolute conflict indicates that neither state has an interest greater than the other's. Thus, in terms of a principled basis upon which a choice can be made, neither state has a "more significant interest" than Illinois. Since neither California nor Missouri can be chosen on a principled basis, the application of the "most signficant relationship" test leads to the use of Illinois law.

Finally, application of Illinois law comports with the general criteria of the Restatement (Second) which emphasize certainty, predictability, uniformity of result, and ease in the determination and application of the law to be applied.[25] In this

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25. The Restatement (Second) also lists other policies including the needs of the interstate system, the policies of the forum and other interested states, the protection of justified expectations, and the basic policies underlying the particular field of law. *See* note 17, *supra*. These other principles are not helpful in the resolution of this issue because their application can cut either way. Neither a decision for nor a decision against punitive damages will make the interstate system work better or worse. The relevant policies of the forum, as we have seen, are countered by the relevant policies of Missouri. "Justified expectations" are not an issue because MDC's corporate headquarters are in Missouri. MDC does not argue, nor reasonably could it, that it somehow

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case, it is important to resolve the conflict between states by a principled means. Determining that all other factors being equal, the law of the place of injury shall be used, provides a principled means of decision which also creates certainty.

Future defendants cannot predict, of course, where airplane disasters will occur. But air transportation companies will now be on notice that, under the "most significant relationship" test, when there is a true conflict between laws of states having equal interests in the issue of punitive damages, and when the place of injury has a strong interest in air safety and in protection of air transportation corporations, the law of the place of injury will apply. Our result also comports with the Restatement (Second)'s principle that choice-of-law rules should be relatively simple and easy to apply. Restatement (Second) §6, at 10. We conclude therefore, that under the "most significant relationship" test, the law of Illinois should apply. For the above reasons, we grant MDC's motion to strike punitive damages claims.

B

We now apply the Illinois "most significant relationship" test to American. The significant contacts to be examined are the place of injury, the place of alleged misconduct, the principal place of business, and the place where the relationship between the parties is centered. As discussed with regard to MDC, the place of injury is Illinois and the place where the relationship

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justifiably expected it would not be held to Missouri law for its corporate decisions. Finally, the basic policies underlying the field of punitive damages are in conflict. Each state legislature weighs the balance of deterring wrongful conduct or protecting defendants from excessive liability and then makes its decision accordingly.

between the parties is centered is either Illinois or California. Neither of these states allows punitive damages. The place of American's alleged misconduct is Oklahoma, site of its maintenance base, which does allow punitive damages.

The place of American's principal place of business for purposes of this analysis is disputed.. Prior to 1979 and during part of 1979, American's principal place of business was New York, which does not allow punitive damages. Subsequently, American moved to Texas, which does allow punitive damages. Plaintiffs argue, first, that the law of American's present principal place of business, Texas, should govern the punitive damages issue. Second, plaintiffs argue that, if the principal place of business on the date of the crash must be used, American's principal place of business on that date was Texas.

First, plaintiffs argue that since the purpose of allowing punitive damages is to control future conduct by deterrence, the current principal place of business is the only state that can control future conduct; the principal place of business on the date of the accident can no longer do so. As support for their argument, plaintiffs rely on *Miller v. Miller*, 22 N.Y. 2d 12, 290 N.Y.S. 2d 734, 237 N.E. 2d 877 (1968), *remittitur denied*, 22 N.Y. 2d 722, 292 N.Y.S. 2d 107, 239 N.E. 2d 104 (1968), in which the New York court found that a defendant who moved from Maine to New York, shortly after an automobile accident in Maine involving a New York resident, should be considered a New York resident for the purpose of determining the applicable law.

The *Miller* case is distinguishable from this case. In *Miller*, the plaintiffs were seeking to avoid a Maine statutory limit on *compensatory* damages in wrongful death actions. Because the *Miller* situation involved the policies of compensation of

survivors, the court was concerned with determining which state had the greatest interest in compensating the New York wife and children of a New York resident. 22 N.Y. 2d at 17, 290 N.Y.S. 2d at 738, 237 N.E. 2d at 879. The court was not confronted with the question of punitive damages, which would have raised the question of Maine's interest in protecting its defendants from liability. Moreover, by the time of trial, Maine had changed its compensatory damage law so that the previous statutory limit had been removed. Thus, the court was not confronted with a situation where Maine had any actual interest in protection of its former resident from financial liability. 22 N.Y. 2d at 21, 290 N.Y.S. 2d at 742, 237 N.E. 2d at 882.

In the case at bar, however, New York has *not* changed its law, as Maine had. New York does have a definite interest in protecting its residents from excessive liability at the time that the event giving rise to the liability occurred. To hold otherwise would be a virtual absurdity because the purpose of a decision to impose or not impose punitive damages has to do with regulation of conduct. If a state's interest in punitive damages "vested" not at the time of conduct but only at trial, a state choosing to allow punitive damages could never deter conduct. It is true, of course, that New York made the decision to give more importance to protection of defendants than to punishment and deterrence. But the issue confronted — punishment or protection — only has meaning in terms of the time of the conduct. Otherwise, *both* the decision to allow and the decision to disallow punitive damages would have the effect of providing protection from punitive damages for the commission of any misconduct, so long as a corporation timely moved thereafter. A corporation would not be deterred from engaging in questionable conduct because it would know that it

merely had to move corporate headquarters before trial in order to escape liability. Thus the *Miller* case does not have decisive persuasive value for our situation.

As the district court indicated, the probability of corporate moves after misconduct is a major policy reason why the principal place of business at the time of the crash — not at the time of trial — must be used. If the "time of trial" rule were to prevail, defendants in "punitive" states could always easily escape such damages by moving their corporate headquarters to a "non-punitive" state. Moreover, the "time of trial" rule should be rejected because, under that rule, there would be no certainty regarding when the "current" principal place of business should be determined. Even "innocent" corporate moves could occur at any number of times: between the accident and the beginning of trial, during lengthy litigation, and also during lengthy appeals. The use of the date of the principal place of business is to be determined.

Plaintiffs' final argument for the use of the current principal place of business is that the decision on punitive damages deals with future behavior and the only state that has an interest in future behavior is the state where the defendant now lives, not the state where the defendant used to live. This argument must be rejected for two reasons. First, since the New York legislature has decided not to allow punitive damages, it has determined that protection of defendants is more important than deterrence of future conduct. Second, the goal of deterrence is not limited to the defendant in question. The entire theory of deterrence assumes that the punishment of one person will cause other persons not to engage in acts similarly punishable. Thus, in a "punitive" state, even if the goal of deterrence can no longer be achieved with regard to a defendant who has moved, it can still be achieved with regard to other defendants within the state. For

these reasons, we find the principal place of business to be used in the "most significant relationship" test must be determined on the date of the crash.

Plaintiffs next argue that American's principal place of business on the date of the crash was Texas, not New York, as held by the district court. Plaintiffs advance two subarguments. First, they argue that American's corporate headquarters had moved to Texas by the date of the accident. Second, they argue that even if the corporate headquarters had not moved by that date, the operations base was in Texas and some cases have held that the operations base, not the corporate headquarters, determines where the principal place of business of an airline is located.

Plaintiffs allege, correctly, that there are inconsistencies in the pleadings regarding American's principal place of business. They allege, and American does not deny, that in the pleadings in these consolidated cases, American gave inconsistent answers, stating in some cases that its principal place of business was in Texas and denying in other cases that its principal place of business was in Texas. Part of the problem seems to be that neither the complaints nor the answers specifically zeroed in on the question of "when" American's principal place of business was "where". Thus, American argues that in those answers admitting that its principal place of business was Texas, the answers referred to the principal place of business at the date of the filing of the complaint, not at the time of the crash. Because of the lack of precision by both defendants and plaintiffs regarding the date of the allegations and denials of principal place of business, we cannot overturn the district court's finding merely on grounds of inconsistent pleadings.

Plaintiffs next argue that the district court's determination that American's principal place of business on the date of the crash was New York was made on the basis of matters outside the pleadings: American's unverified assertion in its reply brief that its place of business on the date of the crash was New York. Because the issue was American's motion to dismiss punitive damage claims for failure to state a claim upon which relief can be granted, the governing rule is Rule 12(b) of the Federal Rules of Civil Procedure. Rule 12(b) requires that, if matters outside the pleading are presented with regard to a motion to dismiss for failure to state a claim, then the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[26]

Plaintiffs correctly argue that, because the district court did consider matters outside the pleadings within the meaning of Rule 12(b), the motion should have been treated as one for summary judgment and disposed of in accordance with Rule 56. The district court did err in that it considered the motion as a motion to strike under Rule 12(b) and not as a motion for summary judgment under Rule 56. Plaintiffs argue that this

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26. Federal Rule of Civil Procedure 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b).

error was significant because, thus, neither affidavits nor certified papers were filed and no reference to discovery was made by any party.

But the error made by the district court on this matter must be considered harmless for two reasons. First, plaintiffs misunderstand the scope of the protection of Rule 56. Rule 56 provides that a defendant in a lawsuit may "at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Fed. R. Civ. P. 56(b). Thus, even if the district court had treated the motion as one for summary judgment, it could have decided the question exactly as it did and there could be no objection to the defendant's failure to provide supporting affidavits.

Second, plaintiffs argue that American's principal place of business was determined before discovery was taken on the matter., But subsequent discovery on this issue has proven fatal to the plaintiffs' argument.

The unrefuted deposition testimony of Donald Lloyd-Jones, Senior Vice President of Operations of American, the transcript of which was made a part of the Record on Appeal at plaintiffs' request, disproves plaintiffs' assertion that Texas was American's principal place of business on May 25, 1979:

> Q. Tell me about the move from New York if you will. Was it done in steps, throughout 1979?
>
> A. No, we did the entire move in approximately six weeks time period. The first

function moved to Dallas was the systems operations control center. That was about July 9th or 10th.

Q. When was the decision made to move to Dallas?

A. November of '78.

Q. Was anything done to implement that move until July of '79?

A. Could you be specific? There was planning obviously going on. I am not sure what you mean.

Q. Were any departments moved down there before July of 1979?

A. No sir.

Deposition of Donald Lloyd-Jones, Record MDL 391 #2, 2, at 42.[27]

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27. The deposition of Mr. Lloyd-Jones continued:

Q. Was any space taken down here before July '79?

Mr. Long: Do you mean physically moved into or contracts signed?

Mr. Morgan: Leased, bought, built?

Mr. Long: All of those?

Mr. Morgan: All of those.

Mr. Long: The question is compound, ambiguous and vague.

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Plaintiffs also rely on the fact that American supplied a Texas address as the "address of principal executive offices" on the form 10-Q filed by American with the Securities and Exchange Commission for the quarter ending June 30, 1979. But the form 10-Q was dated August 10, 1979, and was filed on August 14, 1979. The information supplied on the form contains no reference to the crash on May 25, 1979. Thus, the inference is stronger that the address refers to American's address on the date the form was signed than on the date of the crash. Therefore, we find the district court's conclusion that American had not yet moved its corporate headquarters to Texas on the date of the crash was correct.

Finally, the plaintiffs, citing *Herschel v. Eastern Airlines, Inc.*, 216 F. Supp. 347 (S.D.N.Y. 1963) and *Clothier v. United Airlines, Inc.*, 196 F. Supp. 435 (E.D.N.Y. 1961), argue that even if American's corporate headquarters was not in Texas on the date of the crash, its operations base was located in Texas and the operations base, not the corporate headquarters, should determine where the principal place of business of an airline is located. But the cases relied on by the plaintiffs are not

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Mr. Morgan: Leased? How is that?

Mr. Long: That is fine.

A. Lease was entered into, it's certainly a matter of record when that was signed. I don't honestly remember when that was signed. But it is a matter of record.

No one moved, however, until July. There was no work done on preparation of the facility, until starting some time in June, to the best of my recollection.

Q. I guess we can't move you down here into punitive country, then.

Record, MDL 391 #2, 2, at 42-3.

persuasive. First, these cases involved a determination of principal place of business for purposes of establishing diversity, not applicability of punitive damages.

Second, even if we look to diversity rules, this circuit applies the "nerve center" test to determine diversity issues.[28] *See Celanese Corp. of America v. Vandalia Warehouse Corp.*, 424 F.2d 1176, 1178 (7th Cir. 1970); *Sabo v. Standard Oil Co. of Indiana*, 295 F.2d 893, 895 (7th Cir. 1961). The mere fact that American's operations base was located in Texas on the date of the crash does not suggest that the operations center was the true "nerve center" of American's activities. Indeed, American's "system operations control center" was in New York on the date of the crash and did not move to Texas until July, 1980. Deposition of Donald Lloyd-Jones, Record, MDL 391 #2, at 42.

For the foregoing reasons, plaintiffs have a very weak argument for placing American's principal place of business in Texas on the date of the crash. Plaintiffs request a remand for additional discovery. But such a remand would seem to be a useless exercise whose only purpose would be to delay this litigation. Moreover, denial of such a remand is appropriate because plaintiffs did not seek to respond in the court below to American's assertion that its principal place of business was New York; nor did they file a motion to vacate after the district court's ruling was announced. Rather, the plaintiffs waited to announce their surprise in this Court.[29]

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28. In the *Herschel* case, the court did not even characterize the facts as involving a direct conflict between the "nerve center" and the place of operations since both were found to be in Miami. 216 F. Supp. at 349.

29. Plaintiffs Nary argue that they accepted American's answer that its principal place of business was Texas and that they have never had the

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It is true the record certainly could have been developed more to specify precise facts regarding where various activities of American were carried out. But, given the unrefuted deposition of Mr. Lloyd-Jones clearly establishing that American had not yet moved its headquarters to Texas on the date of the crash, we conclude that the need for finality on this matter outweighs the faint possibility that further discovery would change the district court's conclusion. Therefore, we affirm the district court's conclusion. American's principal place of business on the date of the crash was in New York.

We now turn to the specific conflict of laws regarding American. Oklahoma, the place of American's alleged misconduct does allow punitive damages, but New York, American's principal place of business does not. Just as we concluded with regard to MDC, we conclude that the place of conduct and the principal place of business each have strong interests in having its law applied to the punitive damages question; we are unable to say that one state's interest is greater than the other. Thus, we follow the same analysis used above in concluding that, under the "most significant relationship" test, when the interests of the states of alleged misconduct and primary place of business are equal and in a true and total conflict, the law of the place of injury is to be used.

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opportunity to reply to American's Reply Memorandum which contained the assertion that American's principal place of business at the time of the crash was New York. But, as noted above, the confusion regarding principal place of business in the pleadings is due in part to the fact that plaintiffs' original complaint did not refer to any date regarding American's principal place of business. American's answer, similarly, did not refer to any date. Thus, the cause of much of the lack of precision must be placed at the plaintiffs' own doorstep. The plaintiffs' argument that they never had the opportunity to respond to American's later, more precise, assertion is also weakened by the fact that they did not file a motion to vacate the district court's judgment because of this issue.

Again, we emphasize that this result in no way signifies a return to the mechanical, wooden law of *lex loci delicti.* Rather, it emphasizes the fact that there must be some principled method of decision when the standard "interest analysis" of conflicts law cannot settle the question. Moreover, as discussed above, the choice of Illinois law is particularly appropriate here. Illinois has strong interests in both protection of airline corporations and in the deterrence of wrongful conduct by those corporations. Therefore, we affirm the district court's decision to strike the claims for punitive damages against American with regard to the actions filed in Illinois.

VI

We now turn to the actions filed in California. California follows the "comparative impairment" approach to choice-of-law questions. *Offshore Rental Co., Inc. v. Continental Oil Co.,* 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 729 (1978); *Bernhard v. Harrah's Club,* 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976).[30] The resolution of conflicts under this test is as follows. First, the respective laws of interested states are examined to ensure that there is an apparent conflict. *Offshore Rental,* 148 Cal. Rptr. at 870. There is such a conflict with regard to both MDC and American because, in both situations, the law of the place of alleged misconduct differs from the law of the principal place of business.

Second, when an apparent conflict is found to exist, the court reexamines the applicable laws and circumstances to see if

30. *See Kay, Comparative Impairment, supra,* note 2; Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws,* 30 Hastings L.J. 255 (1978); and Note, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice-of-Law Cases,* 29 Stan. L. Rev. 127 (1976).

a "moderate and restrained interpretation" of both the policy and the circumstances reveals that only one state has a legitimate interest in the application of its policy. *Bernhard,* 546 P.2d at 723.[31] But as discussed with regard to the actions filed in Illinois, both the principal place of business and the place of alleged misconduct have strong interests in the protection of defendants and the deterrence of wrongful conduct. We see no restrained or moderate interpretation of either state's policy which can resolve this conflict.

When, as here, the reexamination of an apparent conflict reveals no way in which the conflict can be resolved by a restrained or moderate interpretation, the conflict is indeed a "true" conflict. The comparative impairment analysis "proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." *Bernhard,* 16 Cal. 3d at 320, 128 Cal. Rptr. at 219, 546 P.2d at 723; *see also Offshore Rental,* 22 Cal. 3d at 165, 148 Cal. Rptr. at 872. This approach does not involve the court in "weighing" the conflicting governmental interests in the sense of determining which law represents "better" social policies. Such an approach would vitiate the policies of federalism which, within constitutional

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31. Professor Kay argues that the step of moderate and restrained interpretation was integral to Professor Currie's governmental interest approach and that its use in the new comparative impairment approach announced by the California Supreme Court in *Bernhard* was improper. Kay, *Comparative Impairment, supra,* note 2, at 583. Although some doctrinal inconsistencies do exist between the two theories, *id.,* at 583-86, we are not convinced that this combination of theories is inappropriate. As we understand it, the point is that the reviewing court must look behind an apparent conflict to the precise issue and the precise interest of each state. This approach seems to be the very essence of the depecage concept. *See* Leflar, *American Conflicts Law,* §109, 221-22 (3d ed. 1977).

limits, allow states to determine their own policies as they wish. *Offshore Rental,* 22 Cal. 3d at 165, 148 Cal. Rptr. at 872. *See* Horowitz, *The Law of Choice of Law in California: A Restatement,* 21 U.C.L.A.L. Rev. 719, 753 (1974). Rather, the process used by the comparative impairment approach is "'essentially a process of allocating respective spheres of lawmaking influence.'" *Offshore Rental,* 22 Cal. 3d at 165, 148 Cal. Rptr. at 872, *quoting* Baxter, *Choice of Law and the Federal System,* 16 Stan. L. Rev. 1, 11-12 (1963). This process of allocation involves several steps. First, of course, the states with relevant interests must be identified.

As discussed in relation to the Illinois "most significant relationship" test, the principal place of business and the place of alleged misconduct have strong and equal relevant interests. These states have the interests of deterrence of misconduct or protection of local corporations, as discussed above. Illinois, the state in which the injury occurred, also has an important interest in the application of its law because it is a state in which both the policies of protection of airline corporations and deterrence of misconduct are peculiarly important. Also as discussed with regard to the Illinois test, the domiciliary states of the plaintiffs and their representatives do not have significant interests in the punitive damages question.

The comparative impairment theory requires that the court attempt to determine the relative commitment by each interested state to the law involved. *Offshore Rental,* 22 Cal. 3d at 165-66, 148 Cal. Rptr. at 873. This examination of relative commitment examines two factors: (1) the current status of a statute and the

intensity of interest with which it is held,[32] and (2) the "comparative pertinence" of the statute: the "fit" between the purpose of the legislature and the situation in the case at hand;

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32. The *Offshore Rental* Court stated:

> [W]hile "[i]t is not always possible to say fairly whether [the] policy [underlying a state's law] is one that was much more *strongly held* in the past than it is now, . . . this ground of analysis should not be ignored." (Emphasis added.) (Von Mehren & Trautman, *The Law of Multistate Problems* (1976) p. 337.)
>
> Professor Freund has pointed out that "Statutes [in a domestic case], by reason of their pattern or their prevalence, may evidence a legal climate of opinion which makes less oppressive the responsibility of the judge in choosing between . . . two possible rules of law. . . . A similar resort may be made in multistate cases. *If one of the competing laws is archaic and isolated in the context of the laws of the federal union, it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal . . . .*" (Emphasis added.) (Freund, *Chief Justice Stone and the Conflict of Laws* (1946) 56 Harv. L. Rev. 1210, 1216.) . . .
>
> Moreover, a particular statute may be an antique not only in comparison to the laws of the federal union, but also as compared with the laws of the state of its enactment. Such a statute may be infrequently enforced or interpreted even within its own jurisdiction, and, as an anachronism in that sense, should have a limited application in a conflicts case.

22 Cal. 3d at 165-66, 148 Cal. Rptr. at 872 (emphases by the *Offshore Rental* court).

id., 22 Cal. 3d at 166, 148 Cal. Rptr. at 872, *quoting* Baxter, 16 Stan. L. Rev. 1, 12 (1963).[33]

A

Applying California's "comparative impairment" analysis of MDC, we begin with Missouri. We look first to the current status of its interest in the application of its punitive damages law. Despite defendants' arguments to the contrary, discussed and rejected in Part II, above, we find that Missouri permits recovery in death cases for "aggravating circumstances" when there has been a showing of "wilful misconduct, wantonness, recklessness, or a want of care indicative of indifference to consequences." *Williams v. Excavating and Foundation Co.*, 230 Mo. App. 973, 93 S.W. 2d 123, 127 (1936); *Wiseman v. Missouri Pacific Railroad*, 575 S.W. 2d 742, 752 (Mo. App. 1978); Mo. Rev. Stat. §537.090 (1978).

Recovery for "aggravating circumstances" has been permitted, and the provision has been maintained in the statute

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33. The *Offshore Rental* court stated:

> The policy underlying a statute may be less "comparatively pertinent" if the original object of the statute is no longer of pressing importance: a statute which was once intended to remedy a matter of grave public concern may have fallen in significance to the periphery of the state's laws . . . .
>
> Moreover, the policy underlying a statute may also be less "comparatively pertinent" if the same policy may easily be satisified by some means other than enforcement of the statute itself.

Offshore Rental, 22 Cal. 3d at 166, 148 Cal. Rptr. at 872-73.

through many amendments, the most recent ones being in 1978 and 1979. Mo. Stat. Ann. §537.090 (Vernon, 1980). When a statutory provision that has received judicial construction is reenacted, it is presumed that the intention of the legislature was to adopt the construction given by the court. *See* 73 Am. Jur. 2d, Statutes §331 (1974); *see also American National Ins. Co. v. Keitel,* 353 Mo. 1107, 186 S.W. 2d 447 (1945); and *Gray v. McDonald,* 104 Mo. 303, 16 S.W. 398, 401 (1891). Thus, the current status of Missouri's interest in the application of its punitive damages statute seems strong.

Another factor of the "current status" test is whether a statute is "archaic and isolated" in the context of the laws of other states, *see Offshore Rental,* 22 Cal. 3d at 165. But, because the states in the United States are about equally divided on the punitive damages question,[34] it is not the case that either allowance or disallowance of such damages is "archaic and isolated" among other state laws.

We look, second, to the "comparative pertinence" of Missouri's punitive damages rule to this case, involving a corporation headquartered in Missouri. That is, we look to the "fit" between the purpose of Missouri's legislation and the facts here. The general purposes of allowing punitive damages are punishment of defendants and deterrence of future wrongful conduct. Those purposes are pertinent to the facts of this case. If the claims for punitive damages are allowed and are proven at trial, damage awards against MDC will be larger, perhaps

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34. Plaintiffs assert, and defendants do not dispute, that no more than 22 states deny punitive damages in death cases: Alaska, California, Colorado, Georgia, Illinois, Kansas, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Utah, Vermont, Virginia, Washington, and Wisconsin.

significantly larger, than they would be if the claims are not allowed. Such an increase will certainly be felt by MDC to be "punishment". Similarly, such awards could be expected to deter future wrongful conduct, of the type alleged in this case, both by MDC and by other corporations based in Missouri.

Another aspect of the "comparative pertinence" test is whether Missouri's policy of deterrence can be satisified by some means other than allowance of punitive damage claims.[35] Theoretically, it may be possible that Missouri could initiate a criminal prosecution against MDC for MDC's alleged wrongful conduct. Presumably such a criminal prosecution, if successful, could allow Missouri to achieve its goals of punishment and deterrence. But we should not overemphasize this possibility, because to do so would vitiate the "private attorney general" concept inherent in the allowance of punitive damages in civil suits.

Thus, the application of the "comparative impairment" test to Missouri produces the following results. Missouri has a strong current interest in its punitive damages law; there is a solid "fit" between the purpose of that law and its application to a Missouri-based corporation such as MDC; but, there is some slippage in that "fit" in the sense that Missouri can theoretically achieve at least some of the purposes of its law by other means.

We now examine California's interest under the comparative impairment test. First, we consider the current status of its policy against allowing punitive damages in wrongful death cases. Case law indicates that California seems to have a strong commitment to its policy of denying punitive damages in wrongful death cases. As the court stated in *In Re*

35. *See* note 33 *supra.*

Paris Air Crash, 622 F. 2d 1315, 1317 n. 2 (9th Cir. 1980), "California courts have uniformly held that the statute allowing punitive damage recoveries generally in tort actions is available for death recovering only in survival actions and not in wrongful death suits." *See Tarasoff v. Regents of the University of California*, 17 Cal 3d. 425, 450, 131 Cal Rptr. 14, 33, 551 P. 2d 334, 353 (1976); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

In addition to case law, the refusal of the California legislature to change the law also indicates that California has a strong commitment to its no-punitive-damages rule for wrongful death cases. Although plaintiffs set forth historical and policy arguments designed to show that California has no commitment to its policy against allowance of punitive damages,[36] these

36. Plaintiffs argue that analysis of legislative changes made in 1962 to the California wrongful death and survival statutes, combined with analysis of the California Law Revision Commission recommendations on which those changes were based, reveals that California policy does not truly oppose punitive damages. Plaintiffs state that in its 1960 "Recommendation and Study Relating to Survival of Actions," the Commission concluded that there was no valid reason for an exclusion of punitive damages in death cases. Plaintiffs argue that the Commission recommended that there be a new survival statute known as §573 of the Probate Code, which would specifically preserve a decedent's right to sue for punitive damages and that the wrongful death statute (Cal. Civil Proc. Code §377) be amended to exclude damages recoverable under §573.

Both of those changes were enacted by the California legislature in 1962. Plaintiffs assert that although nothing in the legislative record indicates that the amendment to §377 was to overturn the earlier rule against punitive damages, that is the only possible interpretation of the amendment because the only damages recoverable under §573 that could otherwise have been duplicated were punitive damages.

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arguments have not been persuasive with the California legislature. That legislature failed to amend California's wrongful death statute to include punitive damages after attention had been drawn to that omission. *See In Re Paris Air Crash,* 622 F.2d 1318 n.2.

Plaintiffs argue that the legislature did not need to amend the wrongful death statute because the 1962 amendment to that statute had in effect overturned the rule against punitive damages.[37] These arguments might be persuasive if the question before us was whether California courts *should* have a policy of disallowing punitive damages in wrongful death cases. But of course that question is not, cannot be, and should not be, before us. The question before us is whether California courts *do* have a policy against awarding punitive damages in wrongful death cases. The California Supreme Court answered that question, "yes", in *Tarasoff,* 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 33, 551 P. 2d 334, 353. We are bound to follow that decision under the rule of *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). Thus, we conclude that California has a strong commitment to its policy against allowing punitive damage claims in wrongful death cases.

Second, we now examine the "comparative pertinence" of California's legislation to the facts of this case. First, if California's no-punitive-damages rule is used in this case, the

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Plaintiffs argue that the Commission found that the object of awarding punitive damages was to punish a wrongdoer, and that it would be particularly inappropriate to deny such damages in a case in which the victim was killed, rather than merely injured. In the face of these conclusions, plaintiffs argue, the purpose of the 1962 amendment could only have been to end the discrimination between wrongful death cases and survival cases regarding punitive damages. Plaintiffs argue that the subsequent California cases which have recited the rule against punitive damages in wrongful death cases have failed to consider the true purpose of the 1962 amendment to §377.

37. *See* note 36, *supra.*

purpose of that rule, protection of defendants from excessive financial liability, will certainly be achieved. If punitive damages are disallowed, damages cannot be assessed beyond the award for compensatory damages.

The second aspect of the "comparative pertinence" test is whether the state can achieve its policy by means other than enforcement of the statute in question. The allowance of insurance is an alternative means of vindication of a state's protective policy. As the court stated in *Offshore Rental*, "[t]he fact that parties may reasonably be expected to plan their transactions with insurance in mind may therefore constitute a relevant element in the resolution of a true conflict." 22 Cal. 3d at 166, 148 Cal. Rptr. at 873. California law permits defendants to insure against punitive damages.[38]

Having applied the "comparative impairment" test to California, we arrive at the following results. California has a strung current interest in its policy disallowing punitive damages; there is a solid "fit" between the purposes of that policy and its application to a corporation engaging in conduct in California; but, there is some slippage in that "fit" in the sense that at least some of the purposes of California's policy of financial protection theoretically can be achieved by other means, such as insurance.

Thus, the application of California's "comparative impairment" analysis to the states with the greatest interest in

38. Plaintiffs assert, and defendants apparently concede. App. Reply Br. at 20, that California law does allow defendants to insure against punitive damages. *See* 39 Cal. Jur. 3d §319, at 580-81 (Insurance for "liability imposed by law . . . would appear to cover exemplary as well as compensatory damages when so imposed by final judgment.").

application of their laws reveals that both states have strong commitments to their respective policies. Both policies are clearly pertinent to the issue in this case: Missouri would wish to punish MDC, a Missouri-based corporation, for any wrongdoing related to the DC-10 crash; California would want to shield MDC, a corporation doing business in California, from excessive liability regarding any wrongdoing committed in California related to the DC-10 crash. We do not regard the fact that, in each state, there is a theoretical possibility that the state can vindicate its policy by, respectively, the criminal sanction or the availability of insurance, as significant enough to outweigh each state's interest in application of its respective policy. Moreover, to the extent that these theoretical possibilities do exist, they cancel each other out. Thus, we are unable to say that either state's interest would be impaired less by the failure to apply its policy.

We now turn to the place of injury, Illinois. As discussed above, Illinois does have significant interests under the facts of this case. Under the comparative impairment test, we first consider the current status of the Illinois policy disallowing punitive damages. This policy was examined in Part II of this opinion and, as discussed there, it is strongly held. The rule against punitive damages in wrongful death cases was recently affirmed in *Mattyasovszky v. West Towns Bus Co.*, 21 Ill. App. 3d 46, 313 N.E. 2d 496 (1974), *aff'd*, 61 Ill. 2d 31, 330 N.E. 2d 509 (1975).

The second aspect of a state's commitment to its policy involves the "comparative pertinence" of the state's policy to the facts of the case. Here, the "fit" between the purpose of the Illinois rule and our facts is strong. The purpose of the no-punitive-damages rule is to protect defendants from excessive liability. If Illinois law is applied, MDC, a company which

designs airplanes which fly from and over Illinois, will be protected from excessive liability related to a crash that occurred in Illinois. Perhaps merely as the fortuitous place of an injury alone, Illinois might not have a special interest in protecting this corporation, headquartered in Missouri, which performed its alleged misconduct in California. But as noted in Part III, with regard to the actions filed in Illinois, Illinois was severely affected by this major disaster and Illinois also has strong interests in the protection of airplane-related industries. Because Illinois does have unique interests in both the awarding and the denial of punitive damages, the decision of its legislature to deny punitive damages must be given special attention. For these reasons, then, we find that, all other factors being equal, the interests of Illinois tip the scales against the allowance of punitive damages.

The use of Illinois' interests as the deciding factor regarding the substantive question of punitive damages also comports with principles of certainty and uniformity. Our result under current California choice-of-law law is consistent with our result under Illinois choice-of-law law, which requires the adoption of the law of the place of injury, unless another state has a greater interest in the application of its law. Although California choice-of-law law does not require this result, nothing in our approach is inconsistent with California law.

Finally, although the California "comparative impairment" test is relatively new, the result we reach is also consistent with the result a California court probably would have reached prior to the recent adoption of comparative impairment analysis. Comparative impairment has only been used in two cases by the California Supreme Court, *Offshore Rental*, 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 721, and *Bernhard*, 61 Cal.3d 313, 128 Cal. Rptr. 215, 546 P.2d 719. Using the test in those cases, the

court was able to identify a state whose interest would be "more greatly" impaired by the failure to apply its laws. But the California Supreme Court has not confronted a situation where, under the comparative impairment test, the states with the most relevant interests also were determined to have equal interests. Perhaps in such a situation, the California Supreme Court would apply the test used prior to comparative impairment. Whether it applied the rule of *lex loci delicti, see Bernhard,* 546 P.2d at 720, or Professor Currie's rule that in a true conflict, the law of the forum should always be applied, *see id.*, at 722-23; *see also* Kay, *Comparative Impairment, supra* note 2, at 583, the result would be a decision not to allow the punitive damage claims. For all of the foregoing reasons, therefore, we reverse the district court and grant MDC's motion to strike the punitive damage claims with regard to the actions filed in California.

B

We now consider the punitive damage claims sought against American, with regard to the actions filed in California. As discussed above, the first step in California's analysis is to determine that there is an apparent conflict of laws between the states having relevant interests in the application of their laws. The states which have the relevant interests are: the principal place of business; the place of misconduct; and, under the unique facts of this case, the place of injury.

American's principal place of business at the time of the crash, as discussed above, was New York, which does not allow punitive damages. The place of American's alleged misconduct is Oklahoma, site of its maintenance base, which does allow punitive damages. Thus, we have a clear clash of law regarding interested states. As discussed above with regard to MDC's principal place of business and place of alleged misconduct, we

see no way to reach a compromise via a moderate and restrained interpretation of either policy. Thus, we now examine each state's relative commitment to its policy in order to determine whether either state's interest would be less impaired by the failure to apply its law.

Under the "comparative impairment" test, the first aspect of a state's commitment to its policy is the current status of that policy. The current status of the New York rule against punitive damages seems strong. In *Robert v. Ford Motor Co.*, 424 N.Y.S.2d 747 (1980), the court clearly held that punitive damages were not allowed under the wrongful death statute. The court stated that "[t]he remedy provided by the statute, the recovery of compensatory damages, is exclusive and may not be expanded by the courts." 424 N.Y.S.2d at 749. *See also Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604, 610, 612, 407 N.Y.S.2d 458, 460, 462, 378 N.E.2d 1027, 1030, 1032 (1978).

The second aspect of a state's commitment to its policy is whether that policy is "comparatively pertinent" to the facts of the case. The purpose of a rule disallowing punitive damages is to protect defendants from excessive financial liability. If New York's law is applied, American, a corporation headquartered in New York, will be protected from any damages beyond compensatory damages. Thus, there is a strong "fit" between the purpose of the rule and the facts before us. The next question is whether that state's interest can be achieved in other ways, such as through the availability of insurance. As discussed with regard to MDC, this factor is not of critical importance, but can add another dimension to the analysis of a state's interest. It is not clear whether a corporation can acquire insurance against punitive damages in New York.[39] For the foregoing reasons,

39. This issue was not addressed in the briefs of any of the parties.

against punitive damages is strong and that there is a good "fit" between New York's policy and the facts of this case.

We now examine Oklahoma's interest in its policy allowing punitive damages. The Oklahoma wrongful death statute recently was amended to specify, *inter alia*, the availability of punitive damages.[40] Thus, the Oklahoma legislature seems to

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40. Until 1979, Oklahoma's wrongful death act, in its entirety, provided as follows:

> §1053. Death—action for. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative, if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must issue to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

12 Okla. Stat. Ann. §1053(1977). In 1978, the wrongful death statute was expanded, by amendment, to specify the damages recoverable. In addition to specifically allowing damages for loss of consortium and grief of the surviving spouse, mental pain and anguish suffered by the decedent, pecuniary loss to survivors, the grief and loss of companionship of the children and parents of the decedent, the amendment specifically referred to the availability of punitive damages:

> C. In proper cases, as provided by Section 9 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or his representative if such person be deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

12 Okla. Stat. Ann. §1053 (1979-80 Cum. Supp.).

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have a strong and current interest in the availability of punitive damages.

Second, regarding "comparative pertinence," the policies behind allowing punitive damages are, as discussed above, punishment of wrongdoers and deterrence of future wrongdoing. If punitive damages are assessed against American, those damages will be larger, perhaps substantially larger, than compensatory damages only. American will undoubtedly perceive those additional damages as "punishment". Other corporations performing conduct in Oklahoma will certainly be deterred from engaging in similar conduct. Thus, there is a strong "fit" between the purpose of the policy allowing punitive damages and the facts of this case. Of course, as with Missouri, there is the theoretical possibility that the state could achieve its policies of punishment and deterrence through the use of the criminal sanction.[41] Although this possibility is relevant, it is not

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Section 9 of Title 23 of the Oklahoma Statute states:

> §9. *Jury may give exemplary damages when* in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

23 Okla. Stat. Ann. §9 (1977).

41. Defendants suggest that Oklahoma could effectuate its interests in punishment and deterrence through a prosecution for murder or manslaughter under 22 Okla. Stat. Ann. §134 (1969), which provides as follows:

> §134. *Murder or manslaughter, jurisdiction in certain cases.*

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of great importance because, as discussed earlier, overreliance on this factor would vitiate the "private attorney general" concept inherent in all actions for punitive damages.

Thus, the application of the "comparative impairment" test to Oklahoma leads to the following conclusions. The current status of Oklahoma's policy allowing punitive damages is strong; that policy is comparatively pertinent to the facts of this case; but, there is the remote possibility that the state could vindicate its interest through use of the criminal sanction.

Regarding American, then, we are now confronted with virtually the same situation as with regard to the California actions filed against MDC. There is a true and equal conflict between the punitive damage rules of the principal place of business and of the place of alleged misconduct. Each state's interest would be equally impaired if the rule of the other state were used. The only difference between the analysis regarding MDC and the analysis regarding American is that it seems clear that insurance may be sold to cover punitive damages in California, but it is not clear that such insurance may be sold in New York. But even if the sale of such insurance is not allowed in New York, we do not deem this factor to be strong enough to tip the scales in favor of the application of New York law.[42]

(Cont'd) The jurisdiction of a prosecution for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured dies in another county, or out of the State, is in the county where the injury was inflicted.

22 Okla. Stat. Ann. §134 (1969). We do not decide the applicability of this statute.

42. In this case, even if New York law were applied, the result would not be different because both New York and Illinois disallow punitive damage claims.

Appendix A

As we did in the analysis regarding MDC, we now turn to the state with the next strongest relevant interest, Illinois. For the reasons discussed with regard to the claims against MDC, it seems proper that Illinois law, which does not allow punitive damages, should be the deciding factor. For the foregoing reasons, therefore, we hold that, with regard to the actions filed in California, the motions to strike punitive damage claims against American are granted.

VII

We turn now to the actions filed in New York. Although the New York Court of Appeals has characterized its choice-of-law approach in varying terms, that Court has applied a relatively consistent rule. That rule was formulated in *Babcock v. Jackson*, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 749, 191 N.E. 2d 279 (1963). In *Babcock*, the court specifically rejected the rule of *lex loci delicti* and announced a rule it viewed as equivalent to the Restatement (Second)'s "most significant relationship" test. The court stated that the law to be applied should be that of the state with "the greatest concern with the specific issue." 12 N.Y. 2d at 481, 240 N.Y.S. 2d at 749, 191 N.E. 2d at 283.[43] The

43. Although the *Babcock* court also characterized its choice-of-law test as "[t]he 'center of gravity' or 'grouping of contacts' doctrine," 12 N.Y. 2d at 481, 240 N.Y.S. 2d at 749, 191 N.E. 2d at 283, the court viewed its test as the same test used in the Restatement (Second)'s "most significant relationship" test:

> Justice, fairness and "the best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most

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Babcock rule has been followed in *Long v. Pan American World Airways*, 16 N.Y. 2d 337, 266 N.Y.S. 2d 513, 213 N.E. 2d 796 (1965), *Tooker v. Lopez*, 24 N.Y. 2d 569, 301 N.Y.S. 2d 519, 249 N.E. 2d 394 (1969),[44] and *Neumeier v. Kuehner*, 31 N.Y. 2d 121,

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> interest in the problem' paramount control over the legal issue arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'" . . .
>
> Such, indeed, is the approach adopted in the most recent revision of the Conflict of Laws Restatement in the field of torts. According to the principles there set out, "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort" . . .

12 N.Y. 2d at 481-82, 240 N.Y.S. 2d at 749, 191 N.E. 2d at 283-84 (citations omitted).

44. Defendants argue that the New York Court of Appeals apparently abandoned the Restatement (Second) approach in *Tooker*. But the defendants misread the *Tooker* opinion. In outlining the history of choice-of-law decisions in New York, the *Tooker* court emphasized that the court had rejected the *lex loci delicti* rule in favor of the "greatest interest" rule of *Babcock*, *supra*, and *Dym*, *supra*. Then, referring to the case of *Macey v. Rozbicki*, 18 N.Y. 2d 289, 274 N.Y.S. 2d 591, 221 N.E. 2d 380 (1966), the *Tooker* court criticized the *Macey* decision. Referring to the *Macey* decision, the court said that:

> [s]ubstituted for a rational choice-of-law rule was a method of decision based on contact counting — a method open to the same criticism of unreasonableness as the earlier *lex loci delicti* rule. This analysis has been rejected in subsequent opinions. (Matter of Crichton's Estate, 20 N.Y. 2d 124, 133-34, 281 N.Y.S. 2d 811, 819-20, 228 N.E. 2d 799, 805-6 [1967], adopting the approach of the concurring opinion in Macey v. Rozbicki which adhered to the *Babock* rule: . . . .)

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Appendix A

335 N.Y.S. 2d 64, 286 N.E. 2d 454 (1972).[45]

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24 N.Y. 2d at 576, 301 N.Y.S. 2d at 524-25, 249 N.E. 2d at 398 (citation omitted).

> Presumably the defendants mistakenly read the statement "[t]his analysis has been rejected," to refer to the *Babcock* rule. That statement, however, refers to the *Macey* which is being rejected and *Babcock* which is being approved is seen in the *Tooker* court's approving citation of *Crichton's Estate*, which the *Tooker* court characterizes as "adopting the approach of the concurring opinion in *Macey v. Rozbicki* which adhered to the *Babcock* rule." *id.* Moreover, the *Tooker* court immediately proceeded to apply the *Babcock*, "greatest interest" rule, finding that New York had the only real interest. 24 N.Y. 2d at 576, 301 N.Y.S. 2d at 525, 249 N.E. 2d at 398.

45. Defendants cite *Neumeier* for the proposition that the New York Court of Appeals is turning away from the *Babcock* rule and returning to the rule of *lex loci delicti*. But defendants misread *Neumeier*. Defendants quote the *Neumeier* court as saying the court's post-*Babcock* opinions have "lacked consistency." But a full reading of the passage from which plaintiffs selectively quote reveals that the *Neumeier* court continued to endorse the *Babcock* approach and concluded that in certain types of multi-state *highway* cases, narrower rules could be formulated which would remain consistent with the *Babcock* "greatest interest" test. 31 N.Y. 2d at 127, 335 N.Y.S. 2d at 69, 286 N.E. 2d at 457. Although the principle used in the *Neumeier* case did give preference to the place of the injury, this preference was not a return to the wooden approach of *lex loci delicti*.

Defendants finally argue that the decision in *Cousins v. Instrument Flyers, Inc.*, 44 N.Y. 2d 698, 405 N.Y.S. 2d 441, 376 N.E. 2d 914 (1978), indicates that the New York Court now holds that *lex loci delicti* is the general rule in tort cases. But there are three significant problems with reliance on the *Cousins* opinion.

First, defendants quote the *Cousins* case with selectivity. To be sure, the

(Cont'd)

Appendix A

Because the New York test is the functional equivalent of the Restatement (Second) test, the Illinois test, the conflicts analysis with regard to New York law is the same as the conflicts analysis with regard to Illinois. Thus, for the reasons discussed with regard to Illinois law, we grant the motion to strike New York punitive damage claims against both MDC and American.

VIII

We turn now to the actions filed in Michigan. For many years, Michigan had followed the traditional rule that the substantive law of the place of injury governed all issues in tort actions. *Abendschein v. Farrell,* 382 Mich. 510, 170 N.W. 2d 137 (1969); *Kaiser v. North,* 292 Mich. 49, 289 N.W. 325 (1939). In recent years, however, the Michigan courts' adherence to this *lex loci delicti* rule has weakened. Although it is now clear that Michigan courts have rejected automatic application of the rule of *lex loci delicti,* it is not clear what the new choice-of-law law is.

(Cont'd)

court stated that the rule of *lex loci delicti* was the general rule. But the court immediately added its opinion that the *lex loci delicti* rule, even if it applied to other tort cases, did not mechanically apply to airplane crash cases because of the fortuity of the place of injury. 44 N.Y. 2d at 699, 405 N.Y.S. 2d at 442-43, 376 N.E. 2d at 915.

Second, based on the foregoing argument, the *Cousins* court indeed refused to apply the *lex loci delicti* rule to the airplane crash in issue. Thus, its remark regarding the general rule must be considered dicta.

Third, the approach used by the *Cousins* court is consistent with our conclusion that when the test for the state with the greatest interest cannot resolve the conflicts issue, the court is free to consider the interests of the state of injury and also matters pertaining to equity and judicial efficiency. 44 N.Y. 2d at 699, 405 N.Y.S. 2d at 442, 376 N.E. 2d at 915.

Appendix A

In *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W. 2d 625 (1978), the Michigan Supreme Court declared that the *lex loci delicti* rule would not be applied when to do so would frustrate Michigan public policy. In discussing exceptions to the *lex loci delicti* rule, the *Sweeney* court cited approvingly the case of *Branyan v. Alpena Flying Service, Inc.*, 65 Mich. App. 1, 236 N.W. 2d 739 (1975). The *Branyan* case held that the *lex loci delicti* rule did not apply to airplane accidents and concluded that the "most significant relationship" test should be used to resolve conflicts questions regarding such accidents. 236 N.W. 2d at 742.[46] Thus, it appears that under Michigan law, a court would attempt to determine which state had the most significant relationship to the parties or to the occurrence such that its law should be applied. But if that test did not resolve the question, because of Michigan's strong history of following the *lex loci delicti* rule, see *Sweeney*, 262 N.W. 2d at 625-27, and because the *Sweeney* court declined to completely abandon that rule, we conclude that the Michigan court would then consider the law of the place of injury to be determinative.

Since, in this case, the place of conduct and the principal place of business have equal interests in the application of their

46. The *Branyan* court stated:

> We agree with [the] line of authority that the strict *lex loci delicti* rule should be abandoned in favor of the more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court. More particularly, we think that considerations of public policy and analysis of the respective interests of the jurisdictions involved should accompany the judicial decision-making process in these types of conflict-of-laws cases, and that the rule of *lex loci delicti* should no longer serve to automatically determine which body of law should govern.

236 N.W. 2d at 742-43.

laws, we conclude a Michigan court would resolve this matter by applying the law of the place of injury, Illinois, because of Michigan's strong history of following the *lex loci delicti* rule. Thus, we grant the motions to strike punitive damage claims against both defendants with regard to the actions filed in Michigan.

IX

As the district court determined, Puerto Rico applies the *lex loci delicti* test to tort actions. *Jimenez Puig v. Avis Rent-A-Car System,* 574 F. 2d 37, 40 (1st Cir. 1978); *DeVane v. United States,* 259 F. Supp. 18, 20 (D.P.R. 1966). The law of the place of injury, Illinois, does not permit punitive damages in wrongful death actions. Moreover, denying punitive damages here does not frustrate the public policy of Puerto Rico, since Puerto Rico does not allow punitive damages in tort actions. *Ganapolsky v. Park Gardens Development Corp.*,439 F. 2d 844, 846 (1st Cir. 1971); *Cooperativa de Seguros Multiples v. San Juan,* 289 F. Supp. 858, 859-60 (D.P.R. 1968). Therefore, the district court's grant of the motions to strike punitive damage claims against both MDC and American is affirmed.

X

Finally, we turn to Hawaii. Neither the parties nor the district court have been able to identify the choice-of-law law of Hawaii. The district court concluded that under any of the conflicts rules it considered, the law of New York or Illinois would apply to American. For that reason the district court struck all punitive damage claims against American in actions filed in Hawaii. But the district court denied the motion to strike punitive damage claims against MDC because it concluded that, under some conflicts rules, punitive damages might be assessed against MDC. We must reject the district court's reasoning.

The inability to determine the governing choice-of-law law does not justify placing the burden on one of the parties to disprove the possibility that a choice-of-law rule would impose liability on it. We conclude that where the choice-of-law law cannot be determined, absent an affirmative showing to the contrary, the court should presume that the forum would apply its own law. *See Com'l Ins. Co. Pacific-Peru Const. Corp.*, 558 F. 2d 948, 952 (9th Cir. 1977). We agree with the authors of the Restatement (Second) who state, "where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interest of justice." Restatement (Second) §136, Comment h, at 378.

Hawaii's law regarding punitive damages is disputed. The Hawaii Wrongful Death Act, Haw. Rev. Stat. §663-3 (1976 Repl.), authorizes the recovery of "such damages . . . as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including" itemized elements of loss.[47] The statute makes no reference to punitive damages.

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47. Hawaii Revised Statutes §663-3 (1976 Repl.) provides in relevant part, as follows:

> In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection including (1) loss of society, companionship, comfort, consortium, or protection, (2) loss of marital care, attention, advice, or counsel (3) loss of filial care or attention, or (4) loss of parental care, training, guidance, or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.

Appendix A

Although the question of whether punitive damages are recoverable under the Act has never been squarely decided by the Hawaii Supreme Court, that Court has on several occasions declared that the purpose of the Act is "compensation for loss rather than punishment." *Greene v. Texeria*, 54 Haw. 231, 236, 505 P. 2d 1169, 1173 (1973). *Accord, Ginoza v. Takai*, 40 Haw. 691, 704 (1955), *rehearing denied*, 40 Haw. 734; *Young v. Honolulu Constr. & Draying Co.*, 34 Haw. 426 (1938); *United States v. Harue Hayashi*, 282 F. 2d 599, 603 n. 4 (9th Cir. 1960) (applying Hawaii law). Moreover, the longstanding rule of construction followed by the Hawaii courts for "statutes creating a new cause of action for death" is that "damages must be limited strictly to the pecuniary loss to the beneficiaries caused by such death." *Enos v. Moor Coach Co.*, 34 Haw. 5, 6-7 (1934).

Plaintiffs argue that Hawaii has long recognized the award of punitive damages, but none of the cases which they cite for this proposition involved the Hawaii Wrongful Death Act here in issue.[48] Plaintiffs also embark on a tortuous argument based on a series of cases and legislative actions, concerning computation of damages at the time of death in personal injury cases, which attempts to show that Hawaii does allow punitive damages. But the series of court decisions and subsequent legislative action detailed by the plaintiffs did not involve punitive damages.[49] The

48. Plaintiffs cite the following cases: *Bernard v. Loo Ngawk*, 6 Haw. 214 (1877); *Bright v. Quinn*, 20 Haw. 504 (1911); *Glover, Ltd. v. Fong*, 40 Haw. 503 (1954); *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492 (1954); *Goo v. Continental Casualty Co.*, 52 Haw. 235, 473 P. 2d 563 (1970); and *Anderson v. Knox*, 297 F. 2d 702 (9th Cir. 1961), *cert. denied*, 370 U.S. 915 (1962).

49. In *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P. 2d 96 (1962), the Hawaii Supreme Court held that a decedent's representative had a right to recovery, on behalf of the decedent, of all future earnings lost as a result of the injury and that the right to such future earnings survived in a wrongful death (Cont'd)

(Cont'd)
action. In *Greene v. Texeria*, 54 Haw. 231, 505 P. 2d 1169 (1973), the Hawaii Supreme Court overruled this aspect of *Rohlfing* and held that a decedent's representative could not recover for probable future earnings. Neither case involved punitive damages, but in the *Greene* case the court emphasized that the purpose of damage awards in wrongful death actions was only compensation for loss and not punishment. The plaintiffs argue that *Greene* is inapposite because the court was concerned with duplication of compensatory benefits as "punishment". The plaintiffs argue, that in the case of punitive damages, the intent is precisely to punish the defendant. But the Hawaii Supreme Court seemed to strongly express the opinion that excess damages — damages beyond actual compensation — in order to punish a defendant were not appropriate under the Hawaii Wrongful Death Act. Such reasoning implies that outright punitive damages would not be countenanced.

The plaintiffs next argue that the Hawaii legislature acted to reject *Greene* by enacting §663-8 of the Hawaii Revised Statutes to specifically reinstate the element of damages rejected in *Greene*. Haw. Rev. Stat. §663-8 provides:

> Damages, Future Earnings. Together with other damages which may be recovered by law, the legal representative of the deceased person may recover where applicable under section 663-7 the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his or her actual or probable family and dependents during the period of time decedent would have likely lived but for the accident.

To be sure, the legislature did express disapproval of the court's rejection of future earnings and allowed recovery for such damages. But the legislature went no further. The Hawaii legislature did not reject the *Greene* rationale that damages are only compensatory and not punitive. Rather, the legislature held only that future earnings were a proper item of compensation. Thus, there is nothing in the legislature's action which suggests that Hawaii courts may now award punitive damages.

Plaintiffs cite *Hennigan v. Atlantic Refining Co.*, 282 F. Supp. 667 (E.D. Pa. 1967), *aff'd*, 400 F. 2d 857 (3rd Cir. 1968), *cert denied*, 395 U.S. 904 (1969), and *Reynolds v. Willis*, 58 Del. 368, 209 A. 2d 760 (1965), for the proposition

(Cont'd)

plaintiffs' argument shows only that one element of compensatory damages — future earnings — was specifically allowed by the legislature. It does not establish the proposition that Hawaii would allow punitive damages. For the above reasons, we conclude that Hawaii does not allow such damages.

Having determined that Hawaii law does not authorize punitive damages in wrongful death cases, we must now consider whether the application of that law would "not meet the needs of the case or would not be in the interest of justice." Restatement (Second) §136, Comment h, at 378. Since we have denied the availability of punitive damages with regard to each other state in which actions have been filed, we do not find that the application of Hawaii law would fail to meet the needs of the case or would not be in the interest of justice.[50] In addition, we have found that the use of two modern choice-of-law theories, as well as the old rule of *lex loci delicti*, all lead to the same result in this case. We see no reason why the result with regard to the Hawaii plaintiffs should be different, especially since Hawaii does not allow punitive damages. For these reasons, we grant the motions to strike Hawaii punitive damage claims against both defendants.

XI

In conclusion, we agree with the district court's comments

(Cont'd)
that when a statute does not mention punitive damages, it should not be read to exclude such damages. But the *Hennigan* case construes Pennsylvania law and the *Reynolds* case construes Delaware law. Both cases seem at odds with the reasoning of *Greene* and the admonition of *Enos*, 34 Haw. 5, 6-7, that damages must be limited strictly to pecuniary loss.

50. The Hawaii plaintiffs do not even present any argument as to Hawaii's choice-of-law law. They only argue that, if Hawaii law is controlling, Hawaii law does allow punitive damages. We have rejected this argument.

on the problems involved in determining choice-of-law issues in airplane crash cases. Airline corporations and airplane manufacturers are subject to uniform federal regulation in almost every aspect of their operations, except their liability in tort. As recently as 1978, a bill was introduced in Congress to establish a federal cause of action for injuries suffered through aviation activity. *See* H.R. 10917, 124 Cong. Rec. No. 17 (February 14, 1978). If this bill, or any of its predecessors, had passed, those actions would all be governed by federal law, uniform as to liability and damages, rather than by the varying laws of a number of states. *See* Note, 28 Vand. L. Rev. 621, 625 (1975). Along with the district court, we conclude that it is clearly in the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments, that airline tort liability be regulated by federal law. Of course, we are well aware of the fact that it is up to Congress and not the courts, to create the needed uniform law.

For the foregoing reasons,[51] the orders of the district court in denying the motions to strike punitive damage claims against MDC are reversed while its orders granting such motions with regard to American are affirmed. Therefore, this case is

REVERSED IN PART AND AFFIRMED IN PART.

CUDAHY, *Circuit Judge,* Concurring:

I join without reservation in the result and commend the insight and creativity of Judge Sprecher's probing analysis.

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51. Matters not expressly discussed in this opinion have nevertheless been duly considered. They have been found either wanting merit or insufficiently important to warrant discussion. Their discussion would not have altered this decision.

Decisive in the district court's disposition of the punitive damages problem and of considerable analytical prominence in our own is the concept that the two states of the defendants' principal places of business have a weighty interest in their respective policies toward either awarding or denying punitive damages. This view may be most significant in the case of McDonnell Douglas, domiciled in Missouri. The district court found that claims for punitive damages against this defendant could stand because of Missouri's position that tort-feasors in wrongful death cases could be subjected to damages punitive in character if "aggravating circumstances" were shown. We, in turn, have determined that major weight should be accorded to Missouri's position favoring such exemplary damages under the principle of "corporate accountability." Some question remains for me whether Missouri would, in fact, have a strong interest in imposing financial sanctions on its own corporate domiciliary, employing Missouri citizens and paying Missouri taxes, as punishment for that corporation's *extraterritorial* torts affecting non-residents of Missouri. The finding of such a Missouri interest may impute an unusual level of altruism of Missouri policy and may overstate the commitment of Missouri (or any other state) to "corporate accountability" in circumstances where both the misconduct and the injuries took place outside the borders of the domiciliary state. Nonetheless, I am willing, *arguendo* and for present purposes, to indulge these assumptions (which seem enlightened in theory). But the questions raised about state policy toward extraterritorial torts underline the need for a federal law to govern tort liability for these unthinkable air disasters.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B — ORDER DATED JANUARY 5, 1981

Opinion by Judge Sprecher
Judge Cudahy concurring

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Amended: March 3, 1981

January 5, 1981

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

No. 80-1812

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: MC DONNELL DOUGLAS CORPORATION.

Appendix B

No. 80-1813

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: PLAINTIFFS IN ALL THE CONSOLIDATED CASES IN MASTER FILE NO. MDL 391.

No. 80-1814

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: LLOYD'S BANK OF CALIFORNIA AS EXECUTOR OF ESTATES OF WILLARD R. NARY AND JULIA T. NARY, Deceased.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. MDL 391

Edwin A. Robson, Judge
Hubert L. Will, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED IN PART AND AFFIRMED IN PART, in accordance with the opinion of this Court filed this date. Each party shall bear its own costs on appeal.

APPENDIX C — ORDER DATED MARCH 3, 1981

UNITED STATES COURT OF APPEALS*

For the Seventh Circuit

Chicago, Illinois 60604

March 3, 1981

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

No. 80-1812

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: MC DONNELL DOUGLAS CORPORATION.

No. 80-1813

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: PLAINTIFFS IN ALL THE CONSOLIDATED CASES IN MASTER FILE NO. MDL 391.

Appendix C

No. 80-1814

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

APPEAL OF: LLOYD'S BANK OF CALIFORNIA AS EXECUTOR OF ESTATES OF WILLARD R. NARY AND JULIA T. NARY, Deceased.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. MDL 391

Edwin A. Robson, Judge
Hubert L. Will, Judge

This matter comes before the court for its consideration on the filing herein of the following documents:

1. "BILL OF COSTS" filed herein on January 19, 1981 by counsel for appellee, American Airlines, Inc.

2. "BILL OF COSTS" filed herein on January 16, 1981 by counsel for appellant, McDonnell Douglas Corporation.

3. "PLAINTIFFS COMMITTEE'S OBJECTIONS TO BILLS OF COSTS OF APPELLANT MC DONNELL DOUGLAS CORPORATION, AND APPELLEE AMERICAN AIRLINES" filed herein on February 2, 1981 by counsel for the plaintiffs-appellants.

Appendix C

4. "RESPONSE OF APPELLANT MC DONNELL DOUGLAS CORPORATION TO PLAINTIFFS COMMITTEE'S OBJECTIONS TO APPELLANT'S BILL OF COSTS" received herein on February 6, 1981.

5. "MOTION FOR LEAVE TO FILE A REPLY BY PLAINTIFFS' COMMITTEE TO RESPONSE OF APPELLANT MC DONNELL DOUGLAS CORPORATION TO OBJECTIONS TO BILL OF COSTS" filed herein on February 13, 1981.

6. "REPLY OF PLAINTIFFS' COMMITTEE TO RESPONSE OF APPELLANT MC DONNELL DOUGLAS CORPORATION TO OBJECTIONS TO BILL OF COSTS" received herein on February 13, 1981.

7. "RESPONSE OF APPELLEE AMERICAN AIRLINES, INC. TO PLAINTIFFS' OBJECTIONS TO THIS APPELLEE'S BILL OF COSTS" received herein on February 17, 1981.

Although not accompanied by the appropriate request, the Court herewith GRANTS leave to file the responses of appellant McDonnell Douglas and appellee American Airlines and orders them filed *nunc pro tunc* as of the dates received. Likewise, the Court GRANTS the Plaintiffs Committee's motion to file its reply and orders it filed instanter as of February 13, 1981. Having noted McDonnell Douglas Corporation's objection to the untimely filing of the Plaintiffs Committee's objection to the

bill of costs submitted by McDonnell Douglas, the Court nonetheless orders the Committee's objections filed *nunc pro tunc* as of the date of receipt, February 2, 1981.

On consideration of the documents filed, the Court, in its discretion, hereby orders that the award of costs in the judgment entered on January 5, 1981, is hereby VACATED and the judgment is AMENDED to provide that each party shall bear its own costs on appeal.

This Court's discretion with regard to assessment of costs on appeal, 28 U.S.C. §1920, Fed.R.App.P. 39, includes the discretion to deny costs to the successful party. *Guse v. J.C. Penney Co., Inc.*, 570 F.2d 679, 681 (7th Cir. 1978), *citing* 9 Moore's Fed. Prac. P239.02 (1975). Appellant Mc Donnell Douglas and appellee American Airlines would limit this discretion to the standard enunciated by this Court in *Popeil Brothers, Inc. v. Schick Electric, Inc.*, 516 F.2d 772 (7th Cir. 1975), for a denial of costs to the prevailing party by a district court under Fed.R.Civ.P. 54(d). Specifically, appellant and appellee suggest that this Court should deny costs on appeal to the prevailing party only upon a showing of bad faith.

Without reaching the merits of appellant's argument as to appeals in general, the Court finds it unpersuasive in the instant case. This is an interlocutory appeal taken by parties on both sides of litigation for the purpose of deciding a controlling question of law whose resolution would facilitate the disposition of the multiple complex lawsuits arising out of this disaster. The appeal thus furthers the interests of parties on both sides of the litigation as well as the public interest in expeditious and judicious resolution of legal disputes. In this Court's opinion, to tax costs solely against the plaintiffs under these circumstances would not be a sound exercise of the discretion vested in this Court.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FILED MAY 23, 1980

(DATED MAY 29, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. MDL 391

Judges Robson and Will

H. Stuart Cunningham, Clerk
United States District Court

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

THIS DOCUMENT RELATES TO:

All Actions

This cause is before the Court on the motion of defendants American Airlines, Inc. and McDonnell Douglas Corporation to strike all pending claims for punitive damages for wrongful death by plaintiffs in these consolidated actions.[1] The present motion concerns only punitive damages incident to wrongful death claims, and does not concern punitive damages ancillary to claims for property damage, personal injury or other claims. For the reasons stated, the motion is granted in part and denied in part.

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1. Some plaintiffs contend that the motion is more properly considered as a motion to dismiss for failure to state a claim under F.R. Civ. P. 12(b)(6) since motions to strike under Rule 12(f) must be filed within certain time limits. However, F.R. Civ. P. 12(f) provides that a court may consider a motion to strike at any time.

Appendix D

The relevant facts for the purposes of this motion are primarily undisputed. The crash and consequent deaths occurred in Illinois. Plaintiffs and their decedents were and are residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Puerto Rico, and Vermont, as well as Japan, the Netherlands and Saudi Arabia. At the time of the crash, American Airlines, Inc. [hereinafter referred to as American], a Delaware corporation, had its principal place of business in New York. In August 1979, American moved its principal place of business to Texas. At the time of the crash, American's operations base was in Texas, and its maintenance department was headquartered in Oklahoma. Defendant McDonnell Douglas Corporation [hereinafter referred to as MDC], a Maryland corporation, had its principal place of business in Missouri. The DC-10 aircraft was designed and built by MDC in California.

Defendant MDC argues that this Court should apply the law of Illinois, the place of the injury, to all actions, and that Illinois law does not allow punitive damages. Defendant American argues that the law of Illinois should be applied to actions originally filed in Illinois and Michigan, and that of New York should be applied to actions originally filed in New York and California. American contends that neither Illinois nor New York permits punitive damages in a wrongful death action.

The plaintiffs take various positions. Some contend that the conflict of law rules of all the forum states require us to apply the law of defendants' principal place of business or the law of the state where the alleged wrongful conduct occurred. Other plaintiffs, notably those from Michigan and Hawaii, assert that the conflict of law rules of those forums require the Court to apply the law of the plaintiff's domicile. All plaintiffs contend that under the applicable state law, punitive damages are

recoverable in a wrongful death action. Additionally, plaintiffs contend that to deny punitive damages in wrongful death actions, while permitting them in personal injury actions, violates the equal protection clauses of the United States Constitution, and the Illinois, California and Michigan state constitutions.

CONFLICTS OF LAWS

Since the jurisdiction of this Court is based on diversity of citizenship, we must apply the choice of law rules of the state where the actions were originally filed. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964). Therefore, we will consider the choice of law rules of Illinois for actions originally filed in Illinois, and the choice of law rules of California, Michigan, New York, Puerto Rico and Hawaii for actions originally filed in those jurisdictions. We have already decided that the liability in these actions is to be determined under Illinois law, and compensatory damages probably are to be governed by the law of the domicile of the plaintiffs or their decedents. *In Re Air Crash Disaster Near Chicago, Illinois*, 480 F. Supp. 1280 (N.D. Ill. 1979). However, the conflict of law rules require a different result as to punitive damages.

ACTIONS FILED IN ILLINOIS

Illinois courts apply the "most significant relationship" test of the Restatement (Second) of Conflict of Laws to determine the applicable law in a tort action. *Ingersoll v. Klein*, 46 Ill.2d 42 (1970). Under this test, four "contacts" generally are considered most important in determining which law applies: (1) the place of the injury; (2) the place where the conduct causing injury

occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, of the parties is centered. *Ingersoll, supra* at 47-48. Illinois courts consider the purpose of the tort rule involved when determining the relative importance of the various contacts to the issue under consideration.

The first and second factors are considered significant where the issue concerns the defendant's adherence to standards of conduct. The state in which the conduct occurred and the state of injury have the greatest interest in regulating behavior within their jurisdictions. In the present case, the state in which the wrongful conduct occurred and the state of injury are different. The conduct which allegedly caused the injury, American's improper maintenance of its airplane and MDC's faulty design and construction of the plane, presumably occurred in Oklahoma and California, respectively, although this is not entirely clear. The accident, however, occurred in Illinois. *Lechikies v. Playboy Club of Lake Geneva, Inc.*, 465 F. Supp. 80 (N.D. Ill. 1979); *Kramer v. McDonald Systems, Inc.*, 61 Ill. App. 3d 164 (1976); *Jackson v. Miller-Davis*, 44 Ill. App. 3d 164 (1st Dist. 1976); *See* Restatement, §146, comments d and e.

Where, as here, the conduct causing injury occurs in a state other than that in which the injury occurred, the importance of the place where the conduct occurred increases. The purpose of punitive damages is to punish and deter wrongdoing. *Sibley v. KLM-Royal Dutch Airlines*, 454 F. Supp. 425 (S.D.N.Y. 1978); *Jackson v. Koninklijke Luchtvaart Maatschappij N.V.*, 459 F. Supp. 953 (S.D. N.Y. 1978). The state in which the wrongdoing actually occurred has a greater interest than the state where the effect of the wrongdoing fortuitously manifested itself. *See* Restatement, §146, comment e.

Appendix D

The third factor, the defendant's principal place of business, is also important where the issue is what state's law governs the availability of punitive damages. A state's purpose in granting punitive damages is to insure residents' compliance with standards of conduct; a state's purpose in denying punitive damages is to limit the liability of its domiciliaries in tort actions. *Forty-Eight Insulations v. Johns-Manville Products,* 472 F. Supp. 385 (N.D. Ill. 1979); *Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.I.,* 422 F. Supp. 405 (N.D. Ill. 1976). Both purposes would be served by applying the law of the state of the defendant's domicile.

In *Sibley, supra,* and *Jackson, supra,* the court held that the availability of punitive damages in cases arising from the crash at Tenerife in the Canary Islands of a Pan American 747 and a KLM 747 was governed either by the law of the place of conduct and injury (Spain), or by the law of the principal place of business of KLM (Netherlands), neither of which allowed punitive damages. The court recognized that punitive damages are primarily the concern of the jurisdiction where the conduct occurred or the defendant's business was located. Denial of punitive damages reflects that state's concern with protecting the financial interests of those doing business there and the state of residence's concern with avoiding excessive financial burdens on resident persons and corporations. *See Jackson, supra* at 956.

The fourth factor requires a determination of where the relationship, if any, of the parties is centered. Most of the actions filed in Illinois involve Illinois decedents who purchased their tickets in Illinois for a flight which began in Illinois. Although these factors indicate that the relationship between the parties is, to some degree, centered in Illinois, this is not

significant for the purpose of this motion. Where the tickets were purchased or where the flight began is irrelevant to the question of the defendants' conduct.

Thus, we conclude that the most significant contacts for the purposes of this motion are the places where the conduct causing injury occurred and the states where defendants' principal places of business are located.

We turn first to the question of what state's law determines the availability of punitive damages as far as American is concerned. At the time of the crash, American's corporate headquarters and principal place of business was New York.[2] In August 1979, American moved from New York to Texas. New York clearly does not allow an award of punitive damages in wrongful death actions.[3] *Roberts v. Ford Motor Co.*, 424 N.Y.S. 2d 747 (1980); *Barrett v. State*, 85 Misc. 2d 456, 378 N.Y.S. 2d 946 (Ct. Claim 1976); *see also* N.Y. Estates, Powers & Trusts Law §5-4.3 (McKinney 1967). Plaintiffs argue that Texas,

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2. At the time of the crash, American's center of operations was in Texas. Plaintiffs argue that courts have applied the "operations center" test to determine the principal place of business for carriers such as American. *Herschel v. Eastern Airlines, Inc.*, 216 F. Supp. 347 (S.D. N.Y. 1963); *Clothier v. United Airlines, Inc.*, 196 F. Supp. 435 (E.D. N.Y. 1961). These cases, involving determination of diversity, are not applicable to the present situation. Further, as American indicates, this circuit applies the "nerve center" test to determine diversity issues. *Celanese Corp. of America v. Vandalia Warehouse Corp.*, 424 F. 2d 1126 (7th Cir. 1970). To the extent that this diversity test applies to a determination of the conflicts issues, therefore, it indicates that New York law should be applied.

3. Texas would allow punitive damage recovery by spouses or descendants in a wrongful death action. Tex. Const. Art. 16, §26 (1975). *See also Scoggins v. Southwestern Elec. Service Co.*, 434 S.W. 2d 376 (Tex. Civ. App. 1968); *Pace v McEwen*, 574 S.W. 2d 792 (Tex. Civ. App. 1978).

American's present headquarters, is more significant for the purpose of the punitive damage issue because New York has no interest in shielding a former resident from excessive financial burdens.

In a similar case, *Miller v. Miller,* 22 N.Y. 2d 12, 290 N.Y.S. 2d 734 (1968), the New York court found that a defendant who moved from Maine to New York shortly after an automobile accident in Maine involving a New York resident, should be considered a New York resident for the purpose of determining the applicable law. In that action, however, the defendant had previously resided in New York for a substantial period of time prior to a short residence in Maine, and application of the Maine law would have limited the compensatory damages recoverable by the New York resident.

We conclude that policy considerations support finding New York, American's principal place of business at the time of the crash, determinative. A corporate move during lengthy litigation is not uncommon, but the move should not affect the substantive law to be applied in that litigation. Although in this action, American moved to a jurisdiction where the law arguably would increase its potential liability, the opposite situation might also occur. It would be clearly inequitable to allow a defendant to diminish the rights of the plaintiff through moving corporate headquarters, however legitimately, at some point after the injury occurred. We will, therefore, consider New York the relevant principal place of business for defendant American.

Where, as here, the law of the principal place of business conflicts with that of where the particular conduct (maintenance) occurred, we conclude that the former should prevail. Responsibility for corporate conduct in the form of punitive damages should be uniform regardless of where the particular

operation took place. American provides an excellent example of the confusion that a different rule would cause where, as is now common practice, a corporation chooses to locate different operations in various jurisdictions. American maintained its corporate headquarters in New York, its operations base in Texas, its maintenance department in Oklahoma, and conducts business throughout the country. Application of the law where the allegedly wrongful conduct occurred would require extensive examination of the particular employees and operations involved, as well as varying rules depending upon the particular type of conduct involved. It might also be necessary to determine the locations of the employees or corporate officers primarily or ultimately responsible for the conduct in question.[4] In the instant case, it might well involve maintenance performed in more than one state.

The most significant relationship test seeks to determine the applicable law in accordance with set principles in order to achieve certainty, predictability, and uniformity of result. Restatement, §6. This result is best achieved by placing the responsibility for corporate conduct at the corporate headquarters where, as in the case of punitive damages, the purpose of the tort rule is to punish or deter wrongful conduct, or to regulate the financial burdens on resident persons or corporations. As previously stated, New York does not allow punitive damages in wrongful death actions. *See* page 8, *supra.*

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4. The clear trend of decisions is to hold a corporation responsible for punitive damages only where corporate officers or "management" participated or acquiesced in unlawful conduct. *See Doralee Estates, Inc. v. Cities Service Oil Co.*, 569 F. 2d 716 (1st Cir. 1977); *Jackson v. Koninklijke Luchtvaart Maatschappij, N.V.*, 459 F. Supp. 953 (S.D. N.Y. 1978); *Oakview New Lenox School v. Ford Motor Co.*, 61 Ill. App. 3d 43, 378 N.E. 3d 544, 19 Ill. Dec. 43 (3d Dist. 1978).

We turn now to the question of what law applies to MDC. MDC maintains its principal place of business in Missouri, while the DC-10 aircraft was designed and built in California. The conduct of MDC in question involves alleged defective design and maintenance instructions regarding the DC-10 aircraft. For the reasons previously stated, we will apply the law of MDC's principal place of business, Missouri, to the issue of punitive damages liability.

Missouri does not allow punitive damages *per se* in wrongful death actions. *Glick v. Ballentine Produce, Inc.*, 396 S.W. 2d 609 (Mo. 1965). It does, however, provide that the jury in a wrongful death action may be instructed to consider "mitigating or aggravating circumstances attending the death" where there has been a showing of "wilful misconduct, wantonness, recklessness or want of care indicative of indifference to consequences." Vernon Anno. Mo. Stat., §532.090 (1975); *Wiseman v. Missouri Pacific R.R.*, 575 S.W. 2d 742 (Mo. Ct. App. 1979). The "aggravating circumstances" instruction, while authorizing damages punitive in character based on the defendant's conduct, is not considered punitive damages by Missouri courts. *Glick, supra* at 617. Inasmuch as this element of damage is governed by defendant's conduct, it is appropriately applied in the present actions.

Therefore, for action filed in Illinois, we will grant the motion to strike claims for punitive damages against defendant American, and deny the motion to strike claims for punitive damages against defendant MDC.

ACTIONS FILED IN CALIFORNIA

Unlike Illinois, California does not use the "most significant relationship" test to determine the applicable law in tort cases.

California courts first determine whether a true conflict exists by analyzing the interests of the states whose law might apply to the issue. *Reich v. Purcell,* 63 Cal. Rptr. 31,432 P. 2d 727, 730 (Sup. 1967); *Hurtado v. Superior Court,* 114 Cal. Rptr. 106, 522 P.2d 666, 669-70 (Sup. 1974). California courts recognize that there are three separate interests in wrongful death actions. First, the plaintiff's domicile may have an interest in the compensation of survivors. Second, the state of injury may be concerned with deterring wrongful conduct and protecting persons within its borders. Third, the defendant's domicile may have an interest in limiting residents' liability for damages thereby protecting residents from excessive financial burdens. *Hurtado, supra* at 672-3.

Where the law of the interested states conflict as to a particular issue, the court is to determine the proper law by using the "comparative impairment" approach. *Bernhard v. Harrah's Club,* 546 P. 2d 719 (1976). Under this test, the court determines which state's policy, as reflected by its law, would be more severely affected if it were not applied. *Bernhard, supra* at 724.

As to defendant MDC, the two interested jurisdictions are 1) the place where the conduct occurred, California; and 2) the principal place of business of the defendant, Missouri.

The interest of California in this action is limited. California courts have traditionally held punitive damages not recoverable in wrongful death actions. *Tarasoff v. Regents of California,* 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P. 2d 334 (1976); *Pease v. Beech Aircraft Corp.,* 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1976). Disallowance of punitive damages in wrongful death actions expresses a state policy to avoid excessive financial burdens on state residents. While MDC has substantial

operations in California, as well as in Missouri, it is not a resident of that state. Accordingly, we conclude that California's interest is less than that of Missouri.

As for defendant American, the court must determine whether the laws of Oklahoma or New York should apply. Oklahoma allows punitive damages in wrongful death actions where the defendant acted with "oppression, fraud, or malice." 12 Okla. St. Ann. §1053; 23 Okla. St. Ann. §9. New York does not allow punitive damages. As we stated previously, where the law of the principal place of business conflicts with the place where the particular conduct occurred, generally the former should prevail. Oklahoma's policy would not be severely impaired by application of New York law. Therefore, as to American, we conclude the law of New York applies to the issue of punitive damages. Accordingly, in the actions filed in California, the motion to strike claims for punitive damages will be denied as to defendant MDC and granted as to defendant American.

ACTIONS FILED IN NEW YORK

New York courts apply the "governmental interest" approach in determining the applicable law in tort cases. *Babcock v. Johnson*, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743 (1965); *Long v. Pan Am World Airways, Inc.*, 16 N.Y. 2d 337, 266 N.Y.S. 2d 513 (1965). This test requires the court to determine which state has the greatest concern with the specific issue raised because of its relationship or contact with the parties or the occurrence. *Babcock, supra* at 481. Where there is nothing fortuitous in the fact that the injury occurred in a given state, New York courts will give great weight to the state where the injury occurred. *See Belisario v. Manhattan Motor Rental, Inc.*, 370 N.Y.S. 2d 574, 48 A.D. 2d 477 (1st Dept. 1975); *Walkes v. Walkes*, 465 F. Supp. 638 (S.D. N.Y. 1979).

As New York courts have recognized, however, air crash disasters often present situations where the place of injury is largely fortuitous. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133 (1961); *Gore v. Northeast Airlines*, 373 F. 2d 717 (2d Cir. 1967). That the injury in this case occurred in Illinois can certainly be considered "fortuitous." Under these circumstances, and considering the purpose of punitive damages, a New York court would hold that the law of the principal place of business determines the availability of punitive damages.

The reasons supporting application of the law of the principal place of business under California's interest analysis test support the same result under New York's governmental interest test. This is particularly appropriate for defendant American since its principal place of business is New York. As to defendant MDC, although New York does not allow punitive damages in wrongful death actions, New York, like California, has no interest in protecting a nonresident from financial burdens which would be imposed by the state of residence. Therefore, the law of New York applies to defendant American, and the law of Missouri to defendant MDC in actions filed in New York.

ACTIONS FILED IN MICHIGAN

Michigan, like California, has abandoned the traditional *lex loci delicti* approach to conflicts questions in favor of the "interests analysis" approach. *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W. 2d 625, 628 (1978); *Storie v. Southfield Leasing, Inc.*, 90 Mich. App. 612, 282 N.W. 2d 417, 419 (1979); *Branyan v. Alpena Flying Service*, 65 Mich. App. 1, 236 N.W. 2d 739, 742 (1976). Application of Missouri and New York law would not frustrate a well-established state policy of Michigan since

Michigan has never found punitive damages proper in a wrongful death action. *Currie v. Fitting*, 375 Mich. 440, 134 N.W. 2d 611 (1965).

For the reasons stated with regard to the California, Illinois, and New York actions, therefore, we will apply the law of Missouri as to MDC and New York as to American in actions filed in Michigan. Therefore, the motion to strike will be denied as to defendant MDC and granted as to defendant American.

ACTIONS FILED IN PUERTO RICO AND HAWAII

Puerto Rico applies the traditional *lex loci delicti* test to tort actions. *Jimenez Puig v. Avis Rent-A-Car System*, 574 F. 2d 40 (1st Cir. 1978); *DeVane v. United States*, 259 F. Supp. 18, 20 (D.P.R. 1966). As stated earlier, the law of the place of injury in this case, Illinois, does not permit punitive damages in wrongful death actions. Denying punitive damages here does not frustrate the public policy of Puerto Rico, since Puerto Rico does not allow punitive damages in tort actions. *Ganapolsky v. Park Gardens Development Corp.*, 439 F. 2d 844, 846 (1st Cir. 1971); *Cooperative de Seguros Multiples de Puerto Rico v. San Juan*, 289 F. Supp. 858, 859-60 (D.D. P.R. 1968).

As for actions originally filed in Hawaii, neither plaintiffs nor defendants have discussed the conflicts rules of Hawaii and we have been unable to determine from our research how Hawaii would approach a conflicts question of this sort. Nevertheless, as to defendant American, under any of the conflicts rules previously discussed, interest analysis (California), governmental interest (New York), or most significant relationship (Illinois), the law of New York applies and punitive damages are not available. Under the traditional *lex loci delicti*

test, Illinois law applies, and punitive damages also are not available. Therefore, all pending claims for punitive damages against defendant American will be striken in actions filed in Hawaii.

As previously stated, under some conflicts rules, defendant MDC can be held responsible for punitive-type damages. Therefore, the motion to strike as to defendant MDC will be denied.

CONSTITUTIONAL OBJECTIONS

Several plaintiffs argue that preclusion of punitive damages in wrongful death actions, where they are permitted in personal injury actions, is a violation of the equal protection clause of the federal and Illinois, Michigan, and California state constitutions. In addition, some plaintiffs argue that the differentiation constitutes "special legislation" in violation of Art. 4, §13, of the Illinois state constitution. Ill. Const. Art. 4, §13 (1970). Defendants obviously take the opposite view.

We conclude that a denial of punitive damages in wrongful death actions does not violate the equal protection clause of the United States Constitution. *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Johnson v. International Harvester Corp.*, Slip Opinion A3-79-224 (D.N.D. filed April 9, 1980); *In Re Paris Air Crash Disaster*, 427 F. Supp. 701 (C.D. 1977). Limitations on damages in wrongful death actions, where they are not limited to personal injury actions, have been held constitutional by the majority of courts to consider the question. *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Mitseff v. Acme Steel Co.*, 208 F. Supp. 805 (N.D. Ill. 1962); *Glick v. Ballentine Produce, Inc., supra, appeal dis'd* 385 U.S. 5 (1966); *Butler v. Chicago Transit Authority*, 38 Ill. 2d 361 (1967).

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Denial of punitive damages in wrongful death actions is not "so unrelated to the achievement of any combination of legislative purposes that . . . [the court] can only conclude that the legislature's actions were irrational." *Parham v. Hughes*, 441 U.S. 347, 352 (1979). The state has a legitimate interest in the amount and distribution of damages to survivors of persons wrongfully killed. A state may determine that its interest in maintaining accurate and efficient disposition of property at death is best served by limiting damages in these actions to exclude punitive damages. *See Parham* at 357. Also, the state may believe that any punishment for wrongful conduct, beyond compensation for those injured or killed, is best handled through state of federal criminal processes.

For these reasons, we find that a denial of punitive damages in wrongful death actions does not violate the equal protection clause of the United States Constitution.

The constitutionality under state constitutions of denying punitive damages in wrongful death actions must be addressed since if it is unconstitutional, it might impact on the analysis of the conflicts rules of these jurisdictions.

The equal protection clauses of the Michigan and Illinois constitutions are coextensive with that of the federal constitution. *See Friedman & Rochester, Ltd. v. Walsh*, 67 Ill.2d 413 (1977); *Commissioners of Highways of Town of Annawan v. U.S.*, 466 F. Supp. 745, 769 (N.D. Ill. 1979); *Moore v. Spangler*, 401 Mich. 360, 258 N.W.2d 34 (1977). For the reasons stated with respect to the federal constitution, therefore, the unavailability of punitive damages in these actions does not violate the Illinois or Michigan constitutional protections.

Appendix D

The California equal protection clause, while fundamentally equivalent to that of the federal constitution, requires "some rationality" in the nature of the class singled out." *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal. Rptr. 388 (1973); *Serrano v. Priest,* 18 Cal.3d 728, 135 Cal. Rptr. 345 (1976). There obviously is a rational distinction between the damages of persons injured in accidents who survive and descendants or heirs of persons killed in accidents. There is no substantial difference between not allowing damages for pain and suffering or nature and extent of the injuries in death actions and not allowing punitive damages. The decisions of the courts and legislatures to preclude recovery of punitive damages in wrongful death actions fulfills this requirement. *See contra In Re Paris Air Crash, supra.*

Finally, the special legislation clause of the Illinois constitution must be considered. Art. 4, section 13 of the Illinois constitution provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. . . ." Plaintiffs argue that the *judicial* construction of the wrongful death statute to preclude punitive damages is a special law violative of this provision since the common-law right to punitive damages can be made applicable to wrongful death actions.

This contention ignores the fact that other statutes in Illinois expressly providing that punitive damages may not be recovered have been upheld against challenges that they constitute "special legislation". *Smith v. Hill,* 12 Ill.2d 588 (1958) (upholding ban on punitive damages in breach of marriage promise actions); *Siegall v. Solomon,* 19 Ill.2d 145 (upholding ban on punitive damages in alienation of affections action). Further, the "special legislation" prohibition only requires that the law operate alike in all places and upon all persons in like

circumstances within the state. *Adams v. Continental Cas. Co.*, 21 Ill. App. 3d 111 (1974); *Rincon v. License Appeal Commission of City of Chicago*, 62 Ill. App. 3d 600 (1978); *Friedman & Rochester, Ltd. v. Walsh, supra.*

CONCLUSION

The inconsistency of finding punitive damages available against one defendant and not the other is compelled by differences in the various states' conflict of law and punitive damages rules and reflects the problems inherent in the application of state law to activities of national scope, such as those of the airline industry. Airlines and airplane manufacturers are subject to uniform federal regulation in almost every aspect of their operations, except their tort liability.

As recently as 1978, a bill was introduced in Congress to establish a federal cause of action for injuries suffered through aviation activity. *See* H.R. 10917, 124 Cong. Rec. No. 17 (February 14, 1978). If this bill, or any of its predecessors had passed, those actions would all be governed by federal law, uniform as to liability and damages, rather than by the varying laws of a number of states. *See* Note, 28 Vand. L. Rev. 621, 625 (1975). It is time that this important area of federal concern be addressed by the Congress to prevent substantial and incongruous variations in liability and damages determinations based on identical conduct solely because of differences in state conflicts of law principles and underlying tort law. It is clearly in the interests of passengers, the airlines, and the airplane manufacturers, as well as the state and federal governments, that this national activity be governed by uniform principles of federal law.

Appendix D

One final observation is appropriate. Notwithstanding all of the foregoing, it remains to be determined whether or not the evidence as to the conduct of MDC will warrant the submission of any issue of punitive damages to the jury. That question obviously cannot be answered until a trial on the issue of liability.

For the reasons stated, the motion of defendant McDonnell Douglas Corporation to strike all pending claims for punitive damages in the wrongful death actions before the court will be denied as to all actions, except those originally filed in Puerto Rico. The motion of defendant American Airlines to strike all pending claims for punitive damages in the wrongful death actions before the court will be granted as to all actions.

Because the availability of punitive damages against either defendant may control and effect the scope of discovery of this action, and in the opinion of the court, an immediate appeal from this order will materially advance the ultimate termination of this litigation, this matter will be certified pursuant to 28 U.S.C. §1292(b) for immediate appeal.

An appropriate order will enter.

s/ Edwin Robson
SENIOR JUDGE

s/ Hubert Will
SENIOR JUDGE

May 29, 1980.

APPENDIX E — ORDER DATED MAY 23, 1980

UNITED STATES DISTRICT COURT, NORTH DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable E.A. ROBSON & H.L. WILL

Cause No. MDL 391 May 23, 1980

IN RE: AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

Memorandum opinion filed. Accordingly, the motion of McDonnell Douglas Corp. to strike all pending claims for punitive damages in the wrongful death actions before the court is denied as to all actions, except those originally filed in Puerto Rico. The motion of American Airlines to strike all pending claims for punitive damages in the wrongful death actions before the court will be granted as to all actions. The court is of the opinion that an immediate appeal will materially advance the ultimate termination of this litigation. This matter is certified pursuant to 28 USC §1292(b) for immediate appeal.

APPENDIX F — ORDER DATED MAY 27, 1980

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable E.A. ROBSON & H.L. WILL

Cause No. MDL 391 May 27, 1980

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

Enter order amending the minute order dated May 23, 1980 to read as follows: memorandum opinion filed. Accordingly, the motion of McDonnell Douglas Corp. to strike all pending claims for punitive damages in the wrongful death actions before the court is denied as to all actions, except those originally filed in Puerto Rico. The motion of American Airlines to strike all pending claims for punitive damages in the wrongful death actions before the court will be granted as to all actions. The court is of the opinion that this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order will materially advance the ultimate termination of this litigation. Accordingly, this matter is certified pursuant to 28 U.S.C. §1292(b) for immediate appeal.

APPENDIX G — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States of America

Amendment 5

Criminal actions—Provisions concerning—Due Process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

28 U.S.C. §1292(b): Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §1332: Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State

of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Missouri Statutes Annotated

509.200. Claims of items of special damage shall be specifically stated

When items of special damage are claimed, they shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered.

510.270. Jury shall assess amount of money of recovery, when

When a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery; so, also, if they find for the defendant in case of offsets or other demand for money. When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict. (L. 1943 p. 353 §111)

Appendix G

Missouri Revised Statutes

537.090. Damages to be determined by jury—factors to be considered

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable.

22 Oklahoma Statutes Annotated

§134. Murder or manslaughter, jurisdiction in certain cases

Appendix G

The jurisdiction of a prosecution for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured dies in another county, or out of the State, is in the county where the injury was inflicted.

12 Oklahoma Statutes Annotated

§1053. Wrongful death—Limitation of actions—Damages

C. In proper cases, as provided by Section 9 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or his representative if such person be deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.

Missouri Rules of Civil Procedure

Rule 55.19. Special and Punitive Damages

When items of special damage are claimed, they shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered.

Rule 70.01. Approval of Instructions—Effective Date—Publication Procedure

Appendix G

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

Rule 70.02. Instructions to Juries

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

Rule 71.06. Jury Shall Assess Amount of Money of Recovery, When

When a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery;

so, also, if they find for the defendant in case of a counterclaim, cross-claim or other demand for money. When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict. When both damages for personal injuries and damages to property are allowed by the jury, the verdict shall state separately the amount allowed for the aggregate of the items of damage connected with the personal injury and the amount allowed for the aggregate of the items of damage connected with the injury to the property.